IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Appellants,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of a divided three-judge Federal Court in the Eastern District of New York, entered on December 1, 1975, which dismissed this action and upheld the constitutional validity under the Fifth Amendment to the United States Constitution of Immigration and Nationality Act §101 (b)(1) and (2) (8 U.S.C.§1101 (b)(1) and (2)), insofar as those provisions denied appellants, United States citizens and permanent residents and their alien fathers or children, the status of "child" and "parent" and concomitant statutory rights under the immigration law, solely because they are illegitimate children or their unwed fathers. Appellants submit this Statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented which require plenary review.

OPINIONS BELOW

The majority opinion (Moore, C.J., and Bramwell, D.J.) and the dissenting opinion (Weinstein, D.J.) of the divided three-judge court in the United States District Court for the Eastern District of New York, and the opinion of the single District Judge (Weinstein, D.J.) convening the three-judge court, are not yet reported. They are attached hereto as Appendices A, B, and C, respectively.

JURISDICTION

This action was commenced by plaintiffs as a class action in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §1361, 8 U.S.C. §1329, the Administrative Procedure Act (5 U.S.C. §701 et seq.), 28 U.S.C. §1331, and 28 U.S.C.§§2201 and 2202, to declare

unconstitutional and enjoin the operation and enforcement of Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §§201(b) (8 U.S.C.§ 1151(b)) and 212(a)(14) (8 U.S.C. §1182(a)(14)), insofar as those provisions unconstitutionally deny United States citizens and permanent residents and their alien fathers or children the status of "parent" and "child" and thereby deny them concomitant statutory rights under the immigration law, solely because they are either illegitimate children or their natural fathers. In an opinion filed January 23, 1975 District Judge Weinstein found the constitutional questions presented by this action to be so substantial as to require the convening of a three-judge court pursuant to 28 U.S.C. §§2282 and 2284. On November 28, 1975 a divided three-judge court filed opinions in which the majority, finding that the plaintiffs had standing to maintain this action, that subject-matter jurisdiction was conferred by 8 U.S.C. §1329, but that plaintiffs' constitutional claims were without merit, denied plaintiffs' motion for summary judgment, permanent injunction, and class action certification, granted judgment for defendants, and dismissed the action. The judgment, attached hereto as Appendix D, was entered on December 1, 1975. On December 31, 1975, appellants filed a notice of appeal to this Court, attached hereto with the affidavit of service as Appendix E. The

jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. §1253.

STATUTES INVOLVED

This case involves the constitutional validity of Immigration and Nationality Act §101(b)(1) and(2) (8 U.S.C. §1101(b)(1) and (2)) (66 Stat. 171 (1952), as amended by 71 Stat. 639 (1957), as amended by 89 Stat. 824 (1975)), alone and as incorporated into Immigration and Nationality Act §201(b) (8 U.S.C. §1151(b)) (79 Stat. 911 (1965)) and Immigration and Nationality Act §212(a)(14) (8 U.S.C. §1182(a)(14)) (79 Stat. 917-918 (1965)). The verbatim text of these statutes is set forth in Appendix F.

QUESTION PRESENTED

Whether the Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §§201(b)(8 U.S.C. §1151(b)) and 212(a)(14) (8 U.S.C. §1182(a)(14)), unconstitutionally discriminates against appellants on the basis of sex and illegitimacy, enacts an unconstitutional conclusive presumption, and impermissibly burdens appellants' fundamental interest in the parent-child relationship, in violation of the First, Fifth, and Ninth Amendments to the United States

Constitution, by denying to United States citizens and permanent residents and their alien fathers or children, solely because they are illegitimate children or their natural unmarried fathers, the status , or any opportunity to achieve the status, of "parent" and "child" under the immigration law, and thereby denying them concomitant statutory rights to live together in this country.

STATEMENT

A United States citizen cannot bring his alien relative into the United States as a legal permanent resident unless the alien satisfies or is exempted from the restrictive numerical quota and labor certification requirements. Without exemption from or preference status under the numerical quota system, an Eastern Hemisphere alien can apply for entry only if a quota number remains after initial allotment of the numbers to aliens in preference categories.[1] Even if a quota number is available the alien must further obtain a labor certification. A Western Hemisphere alien cannot enter this country as a legal permanent resident without meeting a general Western Hemisphere numerical quota and obtaining a labor certification. A labor certification is not given at all for a great number of jobs, and for those for which the certification is available it is extremely difficult to obtain.[2]

In recognition that these requirements often seriously burden or completely destroy family unity between a United States citizen or permanent resident and his alien parent or child, Congress enacted Immigration and Nationality Act §§101(b)(1) and (2), 201(b), and 212(a)(14), which exclude a "child" of a United States citizen from numerical quota and labor certification requirements and a Western Hemisphere "parent" of a United States citizen or permanent resident "child" from the labor certification requirement. Included in the definition of "child" and "parent", and thus given a status which effectively permits them to live together in this country, are a legitimate and legitimated child and his parent, a stepchild and stepparent, and an illegitimate child in relationship to his mother and his unwed natural mother.

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1 The available quota numbers are assigned among seven preference categories. A non-preference immigrant can obtain an immigrant visa only when there is an available quota number not used within one of the seven preference categories. The illegitimate child of a United States citizen is considered a non-preference immigrant. INA §§202(a), 203 (8 U.S.C. §§1152(a), 1153).

2 A person seeking a labor certification must submit his job qualifications to an immigration or consular official. The Secretary of Labor has by regulation compiled a list of many jobs for which a labor certification will never be given. 29 CFR §§60.2(2), 60.7. Schedule B. The Secretary of Labor has also compiled a list of jobs -- certain occupations requiring an advanced degree in a medically related field or certain religious professions -- for which a labor certification may be granted if the alien establishes to the satisfaction of an immigration or consular official that he meets the qualifications. 29 CFR §§60.2(2), 60.7. Schedule A. Persons qualified for work in any other job category must have a specific job offer from an employer in the United States. 29 CFR 60.3(c) The Department of Labor must then gather the appropriate evidence and certify that the specific job which the alien will perform in the United States is in short supply and will not adversely affect the wages or working conditions of persons presently in the United States. INA §212(a)(14) (8 USC §1182 (a)(14)).

By operation of the challenged statutory provisions all such persons are presumed to always have the close family relationship which Congress sought to promote by affording them the "parent" - "child" status. Singularly excluded from the definition of "child" and "parent" are an illegitimate child in relationship to his father and his unwed natural father. By operation of the statutory provisions it is presumed that illegitimate children and their unwed natural fathers never have the close family ties which Congress sought to foster and preserve by enacting the statutory scheme. Thus, these provisions preclude unwed fathers and their illegitimate children from even the opportunity for individualized determinations of their "parent" - "child" status.

Set forth below are the facts of the appellants' cases, which dramatically illustrate the invidious discrimination and harsh inequities of the challenged provisions, and which the District Court found to be not in dispute.

Cleophus Warner, a citizen of the United States, is the father of Serge Patrick Warner, an alien, and has since his birth maintained a close relationship with his son. Since 1969, when Serge's mother informed Mr. Warner that she had married and did not want Serge to be returned to her, Serge has lived exclusively with his father. Mr. Warner's petition to classify his son as an "immediate relative" under the Immigration and Nationality Act was rejected on

March 2, 1972 on the grounds that it was mandatorily deniable because Serge Patrick Warner was not the legitimate or legitimated issue of Cleophus Warner.

The effect of the application of the challenged provisions is to deny Mr. Warner, a United States citizen, the care, companionship, custody and maintenance of his child in the United States. Mr. Warner will be separated from the child he has always supported and exclusively cared for since 1969. In turn, Serge Warner will be forced to return to a country where there is no one to care for him. Without "immediate relative" status, Serge Patrick Warner will be subject to a numerical quota and classified as a "non-preference" immigrant. (INA §§202(a), 203 (8 U.S.C. §§1152 (a), 1153)). A non-preference immigrant must not only meet a numerical quota, but must also satisfy a "labor certification" requirement. (INA §203(a)(8) (8 U.S.C. §1153 (a)(8)).

Mr. Warner can do nothing to achieve a status which would allow his son to live with him in the United States. Mr. Warner did everything possible to try to legitimate his child. He recognized paternity shortly after his son's birth and his name appears on the birth certificate. However, the only way he could legitimate his son is by marriage to the mother, who has married another man. Matter of Julianus, Board of Immigration Appeals, Interim Decision #2227 (Sept. 14, 1973); New York Domestic Relations Law §24 (McKinney 1964,

Supp. 1974).

Ramon Fiallo-Sone, an alien, has been the primary caretaker of his five-year old, out-of-wedlock, citizen son, Ramon Martin Fiallo, since the child's birth. A Form FS 497A was submitted on behalf of Ramon Fiallo-Sone to the United States Consulate in the Dominican Republic, the proper preliminary step for obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States citizen child under twenty-one. Consul Catherine Hurley rejected and returned the Form FS 497A in January, 1974. Ramon Martin Fiallo, a citizen of the United States, was thereby denied the statutory right of having his father, Ramon Fiallo-Sone, deemed eligible on the basis of their father-son relationship for an immigration visa and permanent resident status without a "labor certification," since Ramon Martin Fiallo was not legitimate. Mr. Fiallo has sought and been unable to obtain a labor certification in the past.

Trevor and Earl Wilson are permanent residents of the United States under twenty-one. They have always maintained a close relationship with their alien father, Arthur Wilson, to whom they were born out-of-wedlock. When their mother died in September of 1974 they sought to have their father enter the United States to live with and maintain them. Trevor Wilson, as the older child, submitted a Form I-550 to the Immigration and Naturalization Service, the proper

preliminary step for obtaining an immigrant visa and permanent residence for a parent of a United States permanent resident child under twenty-one. Trevor Wilson has received no response from the Immigration and Naturalization Service but it is inevitable that his father will not be exempted from a "labor certification" requirement since the Immigration and Nationality Act does not recognize an illegitimate child and his natural father as "child" and "parent".

The labor certification requirement will realistically be impossible for Mr. Wilson to meet, since the sole job for which he is qualified -- general handy man -- is one for which a labor certification will never be furnished. See 29 C.F.R. § 60.7 (Schedule B). The result is that the Wilson children, permanent residents of the United States, will never be reunited with their father in this country. The "parent-child" status can be obtained in no other way since Mr. Wilson cannot legitimate his children by marriage to their mother, who is dead.

Alleging jurisdiction under 8 U.S.C. §1329, 28 U.S.C. §1361, 28 U.S.C. §1331, and the Administrative Procedure Act (5 U.S.C. §701 et seq.), appellants instituted this class action [3] to declare unconstitutional, as violative of the First,

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[3] The class is defined as all United States citizen natural fathers and their alien children born out of wedlock and not legitimated who are excluded from the definition of "parent" and "child" under INA §§101(b)(1) and (2) (8 U.S.C. §§1101 (b)(1) and (2)) and thereby denied classification of the child as an "immediate relative" exempt from numerical quotas pursuant to INA §§201(a) and (b) (8 U.S.C. §§1151 (a) and (b)) and all United States citizen and permanent resident children born out of wedlock and not legitimated and their alien natural fathers who are excluded from the definition of "parent" and "child" under INA §§101(b)(1) and (2) (8 U.S.C. §§1101(b)(1) and (2)) and thereby denied exemption of the father from a "labor certification" requirement pursuant to INA §212 (a)(14) (8 U.S.C. §§1182(a)(14)).

Fifth, and Ninth Amendments to the United States Constitution, and to enjoin the operation and enforcement of Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §§ 201(b) (8 U.S.C. §1151(b)) and 212(a)(14) (8 U.S.C. §1182(a)(14)), insofar as these provisions unconstitutionally denied appellants the status of "parent" and "child" and thereby denied them concomitant statutory rights solely because they are illegitimate children or their unwed natural fathers. In an opinion filed January 23, 1975, District Judge Weinstein found the constitutional questions presented by this action to be so substantial as to require the convening of a three-judge court pursuant to 28 U.S.C. §§2282, 2284. On November 28, 1975, a divided three-judge court filed opinions resulting in the denial of plaintiffs' motions for summary judgment, permanent injunction, and class action certification, the granting of judgment for the defendants, and dismissal of the action.

The three-judge court found that the plaintiffs had standing to maintain this action and that subject-matter jurisdiction over the action was conferred by 8 U.S.C. §1329. Although finding that "[w]ithout question, the policy behind the statutory enactments was a benevolent one" (Appendix A at 9), the majority held that the statute was not "patently unreasonable" (Appendix A at 8) in light of the objective -- not found by the majority to be the actual legislative purpose of Congress -- of minimizing the potential for spurious claims and facilitating administrative convenience.

In dissent, Judge Weinstein stated that "[s]o blatant a discrimination on the basis of gender and legitimacy is seldom found in modern statutes" (Appendix B at 9) and that "[w]here, as here, statutory invidious discrimination punishes American citizens by denying them familial association . . .

the statute is unconstitutional." (Appendix B at 3-4). Judge Weinstein specifically found that the "legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members" (Appendix B at 10) and held that, in view of this Congressional purpose, there is no rational basis for the discrimination. (Appendix B at 11) Judge Weinstein further held that the statutory scheme was not rationally related to even the speculative purpose of preventing spurious claims and facilitating administrative convenience , and that the provisions created an unconstitutional conclusive presumption that unwed fathers never have close family ties with their illegitimate children, which presumption must constitutionally yield to more individualized determinations. (Appendix B at 19-22). The Court's judgment was entered on December 1, 1975. On December 31, 1975, appellants filed a notice of appeal to this Court.

THE QUESTION IS SUBSTANTIAL

This case presents substantial federal questions which concern the constitutionality of a federal statute of nationwide impact and which require plenary consideration by this Court. At stake for the appellant United States citizens and permanent residents is their fundamental interest in living together with their alien children or parents as a family unit in this country. The parent-child relationship

has been repeatedly recognized by this Court to be of fundamental constitutional stature.[4] The only way in which, realistically, United States citizens and permanent residents and their alien children or parents can be assured of securing a life together in this country is if they are granted the status of "parent" and "child" pursuant to Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)). Yet by their operation these statutory provisions single out unwed fathers and their illegitimate children for automatic exclusion from the fundamentally important "parent" - "child" status, solely because of the gender of the parent and the illegitimacy status of the child. Such invidious discrimination on the grounds of the immutable characteristics of sex or illegitimacy has been repeatedly condemned by this Court.[5] Here such sex and illegitimacy discrimination

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4 Weinberger v. Wiesenfeld, ___ U.S. ___, 43 L. Ed. 2d 514 (1975); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); May v. Anderson, 345 U.S. 528 (1953); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

5 Weinberger v. Wiesenfeld, supra; Stanton v. Stanton, ___U.S.___, 43 L. Ed. 2d 688(1975); Taylor v. Louisiana, ___ U.S. ___, 42 L. Ed. 2d 690 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). (Discrimination on the basis of sex).

Jiminez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md., 1972), aff'd. 409 U.S. 1069 (1972); Glona v. American Guaranty and Liability Insurance, 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). (Discrimination on the basis of illegitimacy).

occur in combination and bear no rational relationship whatsoever to the sole Congressional purpose in enacting the statutory scheme to benefit United States citizens and permanent residents by exempting their alien parents, children, and spouses from restrictive immigration requirements and thereby making possible a family life together for them in this country. This Court has made it clear in its recent decisions that the validity under the Fifth Amendment's Due Process Clause of a federal statute must be measured against such an actual, and not some conjectured, purpose of Congress[6]. Further, the doublebarreled sex and illegitimacy discrimination worked by the challenged provisions is wholly irrational and arbitrary even if its constitutionality could be determined in light of the speculative and hypothetical Congressional purposes which were conjured up by the majority of the court below in sustaining the validity of the provisions. Finally, the harshness and invidiousness of the discrimination involved here is compounded by the statute's effective enactment of a conclusive irrebutable presumption that the close family ties, which it was the exclusive purpose of Congress to protect, are never present between unwed fathers and their illegitimate children, yet are always present for other categories of parents and children. Clearly, this statute's discrimination against

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6 Weinberger v. Wiesenfeld, ___ U.S. ___, 43 L. Ed. 2d. 514 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); cf. Stanton v. Stanton, ___ U.S. ___, 43 L. Ed. 2d 688 (1975).

United States citizens and permanent residents on the combined grounds of sex and illegitimacy, discrimination which bears no rational, let alone compelling, relationship to the actual, or even any hypothetical, purpose of Congress, cannot be tolerated by this Court merely because it occurs in the field of immigration.

An examination of the legislative history of the challenged act and the statutory scheme clearly demonstrates that the exclusive purpose of Congress in enacting Immigration and Nationality Act §101(b)(1) and (2) was to maintain or re-unite family units which include United States citizen or permanent resident members whether or not the relationship is legitimate. Equally, it makes it clear that in enacting the statutory provisions Congress was not concerned with minimizing the risks of so-called "spurious" claims or of maximizing administrative convenience -- wholly hypothetical objectives which the majority below invoked to sustain the challenged provisions. The legislative history of the Immigration and Nationality Act discloses a continuing and "clearly expressed legislative intention to keep together the family unit wherever possible," whether or not the children in that unit were legitimate. House Report No. 1199, p.8, 85th Cong. 1st Sess; 1957 U.S. Code Congressional and Administrative News p. 2021.[7] That Congressional concern

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[7] See, for example, the House Reports for the 1952 and 1965 Acts. "H.R. 5676 implements the underlying intention of our immigration laws regarding the preservation of the family unit." House Report 1365 p. 29 (1952). "Reunification of families is emphasized as the foremost consideration." House Report No. 745, p. 12, 89 Cong. 1st Sess. (1965).

was not limited to "legitimate" family relationships is clearly shown in the legislative history of the 1957 Amendments. "[I]t is believed that there is need for the enactment of the instant section, in order to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock . . . The legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united . . . Sympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent . . .." House Report No. 1199, 85th Cong. 1st Sess., pp. 7-8; 1957 U.S. Code Congressional and Administrative News, pp. 2020-2021. See Immigration Service v. Errico, 385 U.S. 214, 219-220 and n.9 (1966).[8] In light

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[8] See also the Congressional debate in both Houses in which the legislative purpose of family-unit maintainence or re-unification was repeatedly stressed:

> "This bill is praiseworthy in its fundamental purpose - to reunite families." Senator Pastore, Co-sponsor, 103 Cong. Rec. 15497.
>
> "My heart is glad for the thousands of American citizens who will now be able to be reunited with their families from whom they have been separated because of the working of our immigration law." Senator J.F. Kennedy, Co-sponsor, 103 Cong. Rec. 16719.
>
> "We find, then, that the fundamental principle behind the most important provisions of this bill is the reunification of families, a principle to which all must subscribe. In this bill we move forward to remove the personal tragedy of split and separated families. This is a family bill -- a bill for the family -- the American family." Congressman Rodino, House Judiciary Committee member, 103 Cong. Rec. 16307.

(footnote 8 cont. next page)

of the exclusive purpose of Congress to maintain or reunite family units, legitimate or otherwise, which include a United States citizen or permament resident member, there is not even a minimally rational basis for the statutory classification denying the parent-child status to unwed natural fathers and their illegitimate children while automatically granting it to persons in every other conceivable family relationship.

Even if the challenged discrimination could properly be judged in light of the wholly speculative objective of minimizing the risk of spurious claims and of facilitating administrative convenience, it would nonetheless be wholly irrational and unconstitutional.[9] The problems in proving the parenthood of an illegitimate child by his natural unwed father, and the methods of dealing with those problems, are the same as those for proving the parenthood of a legitimate or legitimated child or a stepchild or an illegitimate child

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(footnote 8 cont.)

> Colloquy between Congressmen Celler, Chairman of the Judiciary Committee and Congressman Rodino, member of the Committee:
>
> Rodino: "Is it not a fact that the fundamental principle behind the provisions and the most important provision of this bill is the reunification of families?"
> Celler: "That is correct." 103 Cong. Rec. 16301

9 Jiminez v. Weinberger, 417 U.S. 628 (1974) Cf. U.S. Dept. of Agr. v. Moreno, 413 U.S.528(1973; Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Gomez v. Perez, 409 U.S. 535, 538 (1973); Glona v. American Guaranty and Liability Insurance Co., 391 U.S. 73, 76 (1968).

in relation to his mother.[10] If, for example, plaintiff Serge Warner were born in a country which allowed legitimation by parental recognition or if his father were married to a U.S.

---

10 Paternity and/or maternity must be claimed and proven in cases involving legitimate children, legitimated children, step-children and illegitimate children in relationship to their mothers. The burden of proof of any familial relationship is on the United States citizen or permanent resident and the alien relative. The relationship must be proven to the satisfaction of immigration and consular officials, and they may in all cases require birth certificates, marriage certificates, baptismal certificates, school records, census records, affidavits, letters, photographs, remittances, proof of custody, proof of support, a blood test, personal testimony, an investigation, and any other documents. 8 C.F.R. §204.2

Ignoring the fact that paternity must be proven in parent-child relationships recognized by the statute, the majority opinion below relied on alleged differences in proof of paternity versus maternity. This purported distinction does not, however, withstand close analysis. The majority assumed that the correct name of the mother will always appear on the birth certificate of a child and that there will always be such a certificate. That assumption ignores the fact that birth certificates can be forged as easily by a woman as by a man and that birth certificates, especially of children born in foreign countries, are not always available. As a practical matter the only way in which it would be easier to match up a particular mother and child than to match up a particular father and child would be through testimony by an individual present at the moment of birth asserting that a particular woman did in fact give birth to a particular child. Such proof would be extremely rare. In fact, the indicia of natural parentage used by the immigration and consular officials, including birth certificate, blood test, support and custody, are the same for both natural mothers and natural fathers.

Thus the invalidation of the challenged statutory provisions will leave immigration and consular officials free to determine the family relationship with respect to appellants and their class by the same means -- examination of documents and other indicia of the relationship like custody and support -- that are already employed by those officials to determine the family relationship with respect to persons presently given the "parent" - "child" status.

citizen and she petitioned for his entry as a step-child, immigration and consular authorities would have to make a determination of paternity and on the exact same evidence that is currently available to prove Mr. Warner's paternity. Andrade v. Esperdy, 270 F.Supp. 516 (S.D.N.Y., 1967); Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y., 1965); Matter of Amado and Monteiro, 13 I & N Dec. 179 (B.I.A. 1969); Matter of Sinclair, Interim Dec. #2057 (B.I.A. 1970).

The total arbitrariness and complete irrationality of the statutory discrimination is highlighted by the step-parent provision of the challenged statutes. By that provision, a father is never considered the "parent" of his illegitimate child, but if the father marries, his wife may be his illegitimate child's "parent" and if his wife has an illegitimate child he may be her child's "parent". Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y., 1965); Matter of The, 11 I & N Dec. 449 (1965).

The classification in question is especially pernicious because while it automatically and irrationally deems that each of the covered family relationships constitutes a viable family unit, it at the same time automatically concludes that unwed natural fathers and their illegitimate children never constitute a viable family unit.[11] It makes

[11] The sociological and psychological data presented to and recognized by the Court below, as well as the appellants' own factual circumstances, demonstrate that unwed natural fathers and their illegitimate children in fact often do have close family ties. (Appendix A at 7-8; Appendix B at 16-18)

that presumption conclusive and irrebutable by failing to give unwed natural fathers and their illegitimate children even the opportunity to show that parent and child do in fact constitute a viable family unit. Turner v. Department of Employment Security, ___ U.S. ___, 46 L. Ed. 2d 181 (1975); Weinberger v. Wiesenfeld, ___ U.S. ___, 43 L. Ed. 2d 514 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972). It is especially irrational to assume, as the challenged provisions do, that a viable family unit always exists between a divorced father and his legitimate child over whom he may not even have custody, or between a stepfather and his wife's child, but never exists with respect to an unwed natural father and his illegitimate child. It is equally arbitrary to distinguish between unwed natural fathers, on the one hand, and unwed natural mothers, unwed parents of legitimated children, and unwed natural fathers whose United States citizen wives are stepmothers, on the other.

The inescapable conclusion that the challenged statutory provisions are patently unconstitutional is unaffected by the scope of Congressional power in the immigration field. This Court has left no doubt that Congressional power over immigration is circumscribed by the Constitution.

In its recent constitutional pronouncements in the immigration field, the Court has emphatically held that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution" and that in the immigration area, as in any other, "a resolute loyalty to constitutional safeguards" is required.[12] Almeida-Sanchez v. United States, 413 U.S. 266, 272 and 273, and 275 (Mr. Justice Powell, concurring) (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In sharp contrast to the instant case, cases which sustained broad Congressional power in the immigration area all involved foreign policy considerations or the clearly expressed Congressional choice to exclude or expel a certain group of aliens specifically and clearly perceived to pose a grave danger to the national security or general welfare of this country.[13]

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[12] Like the plaintiff in Wong Yang Sung v. McGrath, 339 U.S. 33 (1949), the appellants in this case seek a procedural opportunity to be heard, here with respect to the existence of the very factor -- the existence of a family relationship -- which is central to the statutory scheme and which is merely presumed for all other family relationships.

[13] E.g. Chae Chan Ping v. United States, 130 U.S. 584 (1889) (abrogation of a treaty with a foreign government); Harisiades v. Shaughnessy 342 U.S. 580 (1951) (Communists); Shaughnessy v. U.S. ex rel Mezei, 345 U.S. 206 (1953) (aliens who are threats to national security); Kleindienst v. Mandel, 408 U.S. 580 (1972) (Communists).

Clearly, the challenged provisions in no way involve Congress' determination of the course of this country's relations with foreign governments. Equally self-evident is the conspicuous absence of an express Congressional concern that illegitimate children or their natural fathers constitute a threat to the national security or welfare of the United States. Finally, this case uniquely involves immigration provisions which are designed to afford statutory rights to United States citizens and permanent residents.

CONCLUSION

For the foregoing reasons, the questions presented by this appeal are substantial and merit plenary consideration of the Court. Probable jurisdiction should thus be noted and the case set for oral argument.

Dated: New York, New York
February 27, 1976

Respectfully submitted,

John E. Kirklin

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Best Available Original Copy
Follows. For Printed Opinion
See 406 F. Supp. 162.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,	:	74 C 1083
Plaintiffs,	:	
-against-	:	
EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,	:	OPINION AND ORDER
Defendants.	:	

APPEARANCES:

JANET CALVO, Esq., New York, N.Y.
(Kalman Finkel, Morton B. Dicker,
John E. Kirklin, Anita Fisher Barett,
Esqs., The Legal Aid Society)
for Plaintiffs.

DOUGLAS J. KRAMER, Esq., Assistant U.S. Attorney, Brooklyn, New York (David G. Trager, United States Attorney, Eastern District of New York) for Defendants.

BEFORE: MOORE, Circuit Judge, WEINSTEIN and BRAMWELL, District Judges.

MOORE, Circuit Judge:

This is an action challenging the constitutionality of two classifications of aliens established by Congress as part of a comprehensive scheme for the admission of aliens into the United States contained in the Immigration and Nationality Act (the "Act"), Title 8 U.S.C. §1101 et seq. Plaintiffs specifically challenge the Act's definition of "parent" and "child" insofar as it excludes the relationship between unwed, biological fathers and their illegitimate children[1/]. The effect of the exclusion is to subject the aliens in question to restrictive numerical quotas and labor certification requirements which are waived for individuals who qualify as parents or children, within the meaning of the Act, of American citizens and permanent residents.[2/] Plaintiffs are three sets of unwed, biological fathers and their illegitimate offspring. Both the aliens excluded by this section of the Act and the American citizens or permanent residents who are these aliens' illegitimate children or biological fathers have joined as plaintiffs in this suit; their claim is that the statutory classification is unconstitutional on its face since unwed biological fathers are excluded while unwed biological mothers are not.

A three-judge court was ordered convened, and plaintiffs have moved this Court for certification as a class action, summary judgment, and a permanent injunction. For the reasons which follow, those motions are denied, and judgment is entered for the defendant. The facts are not in dispute, and may be summarized briefly.

Ramon Fiallo, an infant and an American citizen by birth, applied - through application submitted on his behalf by his mother - to the United States Consul in the Dominican Republic to have his alien father officially declared to be his parent under the immigration laws, so that the latter might remain permanently in the United States. Ramon Fiallo's petition was rejected, the Consul stating that Fiallo senior could not be declared the parent of an American citizen since his child was illegitimate. At present, both parents are living together in this country with their child; although the father could qualify as a parent if he legitimated his son, he and the boy's mother do not wish to marry.

Cleophus Warner, a naturalized American citizen, attempted to have his illegitimate son Serge, a citizen of the French West Indies, officially declared to be his child within the meaning of the Act by filing a petition with immigration authorities in New York, so that the boy might

remain permanently with his father in this country. The petition was rejected since the boy was neither the father's legitimate nor legitimated offspring, and hence he could not meet the Act's definition of a child.

Trevor and Arthur Wilson are two brothers under twenty-one years of age who are permanent residents of the United States. After the death of their biological mother they sought to have their father, a citizen of Jamaica, officially classified as their parent so that he might qualify for permanent residency in this country. It is not clear whether their petition has already been denied, but denial is certain since the boys were never legitimated and hence their father cannot qualify as a parent under the Act.

The alien fathers and son in this action believe that their only realistic avenue of admittance to this country on a permanent basis is through classification as the parent or child of an American citizen or permanent resident. Fiallo senior has sought a labor certificate unsuccessfully in the past; Wilson senior alleges that the only job for which he is qualified - that of general handyman - is one for which the required certificate is not granted.

Subject matter jurisdiction is conferred on this Court by section 279 of the Act, Title 8 U.S.C. §1329.

A threshold question is presented with regard to Fiallo's standing to maintain this action. The administrative

decision on which Fiallo bases this suit is the denial of his petition by the United States Consul at Santo Domingo. Decisions of consuls granting or denying a visa have been held to be immune from judicial review. See, e.g., Loza-Bedoya v. INS, 410 F.2d 343 (10th Cir. 1975). We note, however, that the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular non-reviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts. Plaintiff Fiallo, therefore, is not barred from bringing this action.

Turning to the merits, we begin with the proposition that Congress' power to make rules for the admission and expulsion of aliens is exceptionally broad.

> This Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. Over no conceivable subject is the legislative power . . . more complete than it is over the admission of aliens.
> Kliendienst v. Mandel, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed. 2d 633 (1972) (quotation marks and citations omitted)

The limits to the exercise of this power are few, for an alien has no constitutional right to enter or remain in this country, Kliendienst v. Mandel, supra. Moreover, he may be denied entrance on grounds which would be constitutionally suspect or impermissible in the context of domestic policy, namely, race[3/], physical condition,[4/] political beliefs,[5/] sexual proclivities,[6/] age,[7/] and national origin.[8/]

In regulating the admission of aliens who are the spouses, parents, and children of American citizens and permanent residents, Congress has chosen to specify the kind of relationships which are, for purposes of the immigration laws, embraced within those terms. This is a perfectly proper exercise of the Congressional responsibility to admit into this country those individuals who will be desirable additions to our populace. This includes individuals who will respect our system of government[9/] and who will be useful additions to our labor force,[10/] as well as those whose lives reflect personal standards of conduct important to our society's sense of morality. And while the Congress' view about what kind of marital or parental relation should be encouraged in this country may differ from the individual views held by the members of the courts, it is not for the judiciary to usurp the legislative function and replace the Congressional standards with its own.

A number of courts have ruled on the question of whether, in the immigration field, Congress may constitutionally apply its own standards with respect to the status of familial relations, and we note that this power has consistently been upheld. In United States v. Diogo, 320 F.2d 898 (2d Cir. 1963), this Court held that a marriage valid under state law need not be recognized as valid under the immigration laws.

> Of course Congress may adopt a federal standard of bona fides for the limited purpose of denying immigration priorities to persons whose marriages do not meet the standard. That standard, embodied in the Congressional understanding of the terms "marriage" and "spouse" as those terms appear in the immigration statutes is, of course, the relevant standard to apply in exclusion or deportation proceedings brought under the statutory provisions appropriate. 320 F.2d at 905.

In Faustino v. INS, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971), we held that it was not unconstitutional for Congress to permit citizen children over the age of twenty-one to bring their alien parents into this country without regard to numerical quotas, but to deny that same privilege to citizen children under that age. Accord, Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969). And in an analagous situation the District of Columbia Circuit upheld the application of one aspect of the Act's restrictive definition of child to the provision of the Act granting

priority status to the sons and daughters of American citizens;[11] the effect of the holding was to deny the status of child, and hence the consequent statutory benefits, to aliens who were adopted by American citizens after their fourteenth birthdays.[12] Nazareno v. Attorney General of the United States, supra.

There is no doubt that Congress can establish classifications which result in the granting of benefits to one group of individuals, and their denial to another. Unless the immigration laws in question are wholly devoid of any conceivable rational purpose,[13] or are fundamentally aimed at achieving a goal unrelated to the regulation of immigration,[14] they are not unconstitutional encroachments on the right to equal protection of the laws.

At the request of the Court the Legal Aid Society representing the plaintiffs submitted a most able and exhaustive post-trial memorandum demonstrating via statistical tables and many treatises its thesis that the "courts are giving increasing legal recognition to the reality that unwed fathers, like mothers, have close ties to their illegitimate children." (Post-Argument Memorandum, p. 17). From these statistics and extensive bibliography counsel draw the conclusion that "the evidence leaves no rational underpinning for discriminatory treatment of unwed natural fathers and their illegitimate children, and

leaves no doubt of the patent unconstitutionality of the severe and extreme form of discrimination effectuated by the statutory provisions challenged herein." (Id. p. 21). These conclusions, plaintiffs say (Id. p. 1), demonstrate "the utter irrationality of the unwarranted conclusive presumptions effectuated by the challenged provisions. . ."

However, in view of the need to establish administrative procedures abroad which can process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed, biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable. Cf. Faustino v. INS, supra. For example, while the names of biological mothers routinely appear on such documents as birth certificates, this may not be the case where unmarried fathers have not acknowledged paternity officially at about the time of birth. Although such evidence would not necessarily be conclusive of one's status as a parent, nevertheless we perceive that it might be more difficult for an unrelated adult to pose as a child's mother than a child's father, where the birth certificate contains a definite name and identification of the mother only.

As a matter of law, therefore, the challenged immigration provisions are not so arbitrary or capricious as to be unconstitutional; accordingly, we conclude that plaintiffs' provocative statistics and ably documented argument, which certainly would merit Congress' attention, cannot be given weight here, lest this Court engage in the kind of policy-making activity which is properly the province of the legislative branch and not the judiciary.

Plaintiffs urge that Congress' primary purpose in exempting the parents and children of American citizens and permanent residents from quota limitations and labor certification requirements was to enable families to be together in the United States. Without question, the policy behind the statutory enactments was a benevolent one; however, we cannot accept plaintiffs' unspoken assumption that they, and not Congress, should determine who constitutes the "family" which shall be allowed to enter this country on a priority basis. The statutory language is quite clear in its exclusion of unwed fathers and their illegitimate children; the fact that Congress focused upon the type of family which it determined should have the right to emigrate en masse to our shores[15/] indicates that it may well have decided that, on balance, unwed fathers would not have such relations with their illegitimate children as would justify their being given this special exemption from the normal

immigration requirements which apply to all other individuals seeking visas for permanent residency.

Even if it be assumed arguendo that biological, unwed fathers should under all circumstances be accorded the rights of parents, plaintiffs' constitutional claim cannot prevail. The possibility of joining one's closest family in the United States is a privilege granted by statute, not a right given by the Constitution.

> There can be no doubt but that [the appellants] as unadmitted and non-resident aliens have no constitutional right to enter and remain in this country. It is equally clear that their wives as resident aliens have no constitutional right to keep them here on the theory that the integrity of the family is protected by equal protection principles.
> Noel v. Chapman, 508 F.2d 1023, 1027 (2d Cir. 1975).

The same rule has been applied by this Court when the individual seeking to challenge an alien's expulsion was the alien's United States citizen-child. Enciso-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974); cf. Faustino v. INS, supra. As we recognized in Noel v. Chapman, supra at 1027-8, the burden of separation from one's kin which occurs when an alien relative is properly excludable under our immigration laws and the American citizen or resident determines not to leave this country in order to be with the alien, is not the equivalent of the statutory destruction of the marriage or family relationship. Certainly a dif-

ficult choice is involved, but it is not one which is forbidden by the Constitution.

Plaintiffs' final argument is that the operation of the Act's definition of parent and child works a constitutionally impermissible hardship on them. While we are not unmindful of plaintiffs' plight, we have held in the past that such incidental impact on the family as the operation of the immigration laws may have is not violative of the Constitution. Noel v. Chapman, supra; Enciso-Cardozo v. INS, supra; accord, Robles v. INS., 485 F.2d 100 (10th Cir. 1973); Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969). The law is at times painful to some, but it cannot on that basis alone be automatically invalidated as to all.

Consideration of the class action issue is unnecessary in the light of our decision.

Leonard P. Moore
U.S.C.J.

Henry Bramwell
U.S.D.J.

F O O T N O T E S

1

The relevant section is 1101(b)(1)(2), which reads:

(1) The term "child" means an unmarried person under twenty-one years of age who is--

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements,

if any, of the child's proposed residence: Provided, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

2

8 U.S.C. §1151(b), 8 U.S.C. §1182(a)(14).

3

Dunn v. INS, 499 F.2d 856, 858 (9th Cir. 1974).

4

U.S. v. Esperdy, 277 F.2d 537, 539 (2d Cir. 1960).

5

Kliendienst v. Mandel, supra.

6

Boutilier v. INS, 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed. 2d 661 (1967).

7

Nazareno v. Attorney General of the United States, 512 F.2d 936 (D.C. Cir. 1975).

8

Faustino v. INS, 432 F.2d 429, 431 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971); Hital v. INS, 343 F.2d 466, 467 (2d Cir. 1965), cert. denied, 382 U.S. 816, 86 S.Ct. 36, 15 L.Ed. 2d 63 (1965.

9

Kliendeinst v. Mandel, supra.

10

See, e.g., Buckley v. Gibney, 332 F.Supp. 791 (S.D.N.Y. 197.)

11

8 U.S.C. §115 (a)(1)

12

This is one of the several types of individuals whom we might commonly call children, but who are excluded from the Act's definition of that term. Others excluded are married children, children over twenty-one years of age, stepchildren who were over eighteen when the marriage creating their status occurred, children who were legitimated after they were eighteen. Similarly, the mothers and fathers of these individuals are not accorded the status of parents within the meaning of the Act.

13

This Court has held that there is no need to apply the test of compell[illegible] state interest in immigration cases, since alienage is not a suspect classification for purposes of legislation regulating the admission and expulsion of aliens. Noel v. Chapman, 508 F.2d 1023, 1028 (2d Cir. 1975).

14

In this regard we note that where the Congressional purpose of any law regarding aliens is not to regulate immigration but to invidiously discriminate against American citizens, permanent residents, or already-admitted aliens, that law cannot - in contrast to the one under consideration here - withstand constitutional scrutiny. See How Sun Wong v. Hampto 500 F.2d 1031, 1036 (9th Cir. 1974); Ramos v. United States Civil Service Commission, 376 F.Supp. 361, 366 (D. Puerto Rico 1974); cf. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 91 L.Ed. 2d 534 (1971).

15

Counsel for the Government persuasively suggested at oral argument that plaintiffs' position could have sobering consequences if adopted by immigration officials: an unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological father; each father could then bring over all of the children he has ever fathered, and there-

after each of those children could bring over his or her mother, who could then bring over all of her illegitimate children, etc., etc., etc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

- -x

74 C 1083

DISSENTING OPINION

WEINSTEIN, District Judge (Dissenting):

I. Issues

The constitutionality of the definitions of "parent" and "child" in the Immigration and Naturalization Laws is challenged. Section 101(b)(1) and (2) of the Immigration and Nationality Act (Act), Title 8 U.S.C. § 1101(b)(1) and (2) (1970). Unlike mothers and their illegitimate children fathers, and their illegitimate children, are excluded from the definition of "parent" and "child". They are therefore ineligible for certain exemptions given citizens' relatives who are trying to enter the country: citizen fathers can not have their migrating illegitimate children exempted from numerical quotas and labor certification requirements as their "immediate relatives"; citizen and permanent resident illegitimate children can not have their migrating fathers exempted from the labor certification requirement. Insofar as pertinent, the definitional provision reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> * * *
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> * * *
>
> "(2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

8 U.S.C. § 1101(b) (1970).

The questions presented are (1) whether a statut making it more difficult for a parent and his child -- one of whom is a citizen or permanent resident -- to live together in this country solely because of the sex of the parent and the illegitimacy of the child is valid under th Fifth Amendment; and (2) whether a federal court is withou power to declare such a statute invalid because it is a pa of the immigration laws. The answers should be no. The Constitutional road to equality of the sexes is open to me as well as women. Each of these plaintiffs is being depri of a critical part of his "life . . . without due process law." U. S. Const. Fifth Amend.; cf. id. Fourteenth Amend ("equal protection of the laws").

Legal discrimination between men and women or l timates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying tha

familial association, one of the most precious attributes of humanity, the courts should say what is plain: the statute is unconstitutional. The wrong to parent and to child is not reduced by characterizing the one as a "biological father", without regard for his progeny. Such disdain for filial affection is incompatible with a Constitution embodying the highest ideals of a civilized nation such as ours.

II. Facts

Plaintiffs Ramon Fiallo and Ramon Fiallo-Sone, son and father

Ramon Fiallo is a United States citizen, born in New York City in 1971. Although his father, Mr. Fiallo-Sone, was not married to his mother, his father's name appears on his birth certificate and his father has nurtured him since his birth. An American consul has informed Mr. Fiallo-Sone that he is not eligible for an immigrant visa or permanent residence status without a labor certificate, and that while the labor certificate requirement is waived in the case of fathers of citizen children, the waiver is only available if the child is legitimate issue. A foreign mother of an illegitimate citizen would have obtained the waiver.

Plaintiffs Serge Warner and Cleophus Warner, son and father

Cleophus Warner, a naturalized citizen, is the unwed father of Serge Warner, who was born in the French West Indies in 1960. Mr. Warner's name appears on Serge's birth

certificate, he registered as Serge's father shortly after Serge's birth, and he has acknowledged paternity. Mr. Warner has supported his son since the child's birth. In 1969 Serge, in accord with his parents' and his own desires, entered the United States to live with his father. Father and son took steps to obtain an immigrant visa and permanent residence status for Serge in 1972. The Immigration and Naturalization laws allow citizen parents to bring alien children into the United States as "immediate relatives" without regard to the applicable numerical limitation on immigrants. Mr. Warner's petition was denied on the ground that Serge was not his legitimate issue as required by statute. Had the petition been by a mother who was a naturalized citizen, or had the child been legitimate, the petition would have been granted.

Plaintiffs Trevor and Earl Wilson and Arthur Wilson, sons and father

Trevor and Earl Wilson, who are now permanent residents of the United States, were born in Jamaica in 1957 and 1959 respectively. Arthur Wilson acknowledges the boys as his illegitimate sons. He lived with them and supported them until 1968, at which time they moved to New York City

with their mother. From 1968 until 1974 Mr. Wilson maintained his relationship with his sons by visits and correspondence. He also continued to support them financially. After their mother died in 1974, the two boys asked their father to come to the United States to live with them. But Mr. Wilson was only able to stay for as long as an emergency visa allowed. Since his children are illegitimate, Mr. Wilson is unable to settle in the country without a labor certification. Were a mother in Mr. Wilson's position, or were the children legitimate, the parent would have been able to enter the country without a labor certification.

III. Law

The position of these three families illustrates the severe effects on American citizens and permanent residents from the Act's discrimination between male and female parents and between legitimate and illegitimate children in its definitions of parent and child. The government does not contend that the relationship of parent to child does not exist or that a strong emotional bond between the father and child is lacking in any of these cases. Its position is that the statute compels the discrimination.

This statute, defendant insists, is not subject to judicial review. Characterizing the classification as one of aliens for the purpose of their exclusion from the country, it contends that Congressional power to exclude aliens is unfettered. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); Faustino v. Immigration and Naturalization Service, 432 F.2d 429, 431 (2d Cir. 1970) (Per Curiam), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971).

But this is not a simple case of classifying aliens for the purpose of preferring some over others for entry. Rather, Congress has hinged immigrants' access to this country on their relationship to citizens and permanent residents. The question thus becomes whether a Congressional classification of citizens and permanent residents which severely disadvantages them may escape traditional constitutional scrutiny merely because it is set in alienage legislation.

If the classification were based on race, rather than gender or legitimacy, the court's power would be no different. Were Blacks, for example, excluded from the list of those American citizens who could bring in their

relatives without regard to quotas, no court would let the statute stand. The Constitution, and in particular, the Fifth Amendment, protects citizens from abusive or discriminatory government action. Packaging a discriminatory classification of citizens in alienage legislation can not insulate it from judicial scrutiny.

There is ample Supreme Court precedent for intervention when enforcement of the Act burdens citizens' constitutional rights. United States v. Brignoni-Ponce, U.S. , 95 Sup.Ct.2574, L.Ed.2d (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 273 n.5, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). See also, Burrafato v. United States Dept. of State, F.2d (2d Cir. 1975) (dicta). The Court has recognized procedural due process and Fourth Amendment limitations on the government's exclusion and expulsion of aliens. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50, 70 S.Ct. 445, 454, 94 L.Ed. 615 (1950); Kwock Jan Fat v. White, 253 U.S. 454, 459, 464, 40 S.Ct. 566, 568, 570, 64 L.Ed. 1010 (1920); Kaoru Yamataya v. Fisher, 189 U.S. 86, 100, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903): cf. Lennon v. INS F.2d (2d Cir. 1975).

When courts have been faced with challenges to other sections of the Act which classify aliens in terms of their relationship to citizens, they have not shrunk from traditional equal protection analysis. See Perdido v. Immigration and Naturalization Service, 420 F.2d 1179, 1181 (5th Cir. 1969); Faustino v. Immigration & Naturalization Service, 302 F.Supp. 212, 215 (S.D.N.Y. 1969), aff'd, 432 F.2d 429 (2d Cir. 1970), cert. denied, 461 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971). Cf. Noel v. Chapman, 508 F.2d 1023, 1026-9 (1975).

So blatant a discrimination on the basis of gender and legitimacy is seldom found in modern statutes. Illegitimacy as a basis for denial of rights available to legitimates has been repeatedly struck down as invidious and lacking in rational basis. See, e.g., Jiminez v. Weinberger, 417 U.S. 628, 632, 94 S.Ct. 2496, 2499, 41 L.Ed.2d 363 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 620-621, 93 S.Ct. 1700, 1701, 36 L.Ed.2d 543 (1973) (Per Curiam); Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973) (Per Curiam); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175-1[illegible] 92 S.Ct. 1400, 1406-1407, 31 L.Ed.2d 768 (1972); Glona v.

American Guaranty and Liability Insurance, 391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed.2d 441 (1968); Levy v. Louisiana, 391 U.S. 68, 70-72, 88 S.Ct. 1509, 1510-1511, 20 L.Ed.2d 436 (1968); Tanner v. Weinberger, F.2d (6th Cir. 1975). Gender classifications have also been treated as invalid. See, e.g., Turner v. Dept. of Employment Security, U.S. , Sup.Ct. , L.Ed.2d (1975); Weinberger v. Wiesenfeld, U.S. , 95 S.Ct. 1225, 43 L.Ed 2d 514 (1975); Stanton v. Stanton, U.S. , 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); Ginsburg, Gender and the Constitution, 44 U.Cinn. L. Rev. 1 (1975).

The legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members. Not a shred of evidence has been produced to support the government's claim that the statutory purpose was to prevent spurious paternity claims by unwed natural fathers. As one of the provision's co-sponsors put it: "This bill is praiseworthy in its fundamental purpose --

to reunite families." 103 Cong. Rec. 15497 (1957) (remarks of Senator Pastore). See also, H.R.Rep. No. 1199, 85th Cong., 1st Sess. 7-8 (1957); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952); 1957 U.S. Code Cong. & Ad. News 2020-2021; 103 Cong. Rec. 16719 (1957) (remarks of Senator Kennedy); 103 Cong. Rec. 16307 (1957) (remarks of Representative Rodino); Immigration Service v. Errico, 385 U.S. 214, 219-220 and n. 9, 87 S.Ct. 473, 477-478, 17 L.Ed.2d 318 (1966); Nation v. Espe 239 F.Supp. 531, 534-535 (S.D.N.Y.1965). The courts must disti the general legislative purpose from the legislative history, particularly where it supports a reasonable non-sexist interpretation. Weinberger v. Wiesenfeld, U.S. , , 95 S.Ct. 1225, 1233-35, 43 L.Ed.2d 514 (1975). In view of the Congressional purpose to reunite families, th is no rational basis for the statutory classification denying the parent-child status to unwed natural fathers and their illegitimate children while automatically granting it to persons in other family relationships.

Even if Congress were motivated by a desire to discriminate against men and illegitimates in a way harmful to American citizens, the statute could not stand.

It is firmly established that a natural parent, whether father or mother, and a child, whether legitimate o not, have fundamental, constitutionally protected interests in mutual companionship and a life together.

> "The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '[r]ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953)."

Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). See also, Weinberger v. Salfi, U.S. , 95 S.Ct. 2457, L.Ed.2d (1975); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169, 92 S.Ct. 1400, 1403, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U. 68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436 (1968).

> "It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father, no less than a mother, has a

> constitutionally protected right o the "companionship, care, custody, a management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972)."

Weinberger v. Wiesenfeld, U.S. , , 95 S.Ct. 1225, 1235, 43 L.Ed.2d 514 (1975).

Courts now recognize that unwed fathers, like mothers, often have strong ties of affection to their illegitimate children and desire a continuing relationship with them. See, e.g., Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974) (Per Curiam) (statute permitting adoption without notic to natural father of illegitimate unconstitutional); People ex rel. Slawek v. Covenant Children's Home, 52 Ill.2d 20, 284 N.E.2d 291 (1972) (statute precluding father of illegitimate from asserting right to child and denying custody unconstitutional); In Re Mark T., 8 Mich. App. 122, 154 N.W.2d 27, 35 (Ct. App. 1967) (custody of illegitimate child awarded to father after mother's release of child for adoption) and cases cited 154 N.W.2d at 33 n. 7, 154 N.W.2d at 35 n. 13; R. v. F., 113 N.J.Super. 396, 273 A.2d 808 (Juv. & Dom.

Rel. Ct. 1971) (denying father and his natural child of right to see each other deprives them of equal protection); Application of Juan R., (N.Y.Fam.Ct.), in N.Y.L.J., Oct. 28 1975, at 1, col. 3 (putative father who has established paternity may bring action to acquire visiting right: without litigating custodial issues); Stone v. Chip, 68 Mis: 2d 134, 326 N.Y.S.2d 520 (Fam.Ct. 1971) (criticizing rule that mother should have child absent proof she is unfi: Conley v. Johnson, 24 N.C.App. 122, 210 S.E.2d 88 (Ct.App. 1974) (court may order visitation rights for father of illegitimate despite mother's objection); Hammack v. Wise, 211 S.E.2d 118, 121 (W. Va. 1975) (father awarded custody of illegitimate child); State ex rel. Lewis v. Lutheran Social Services, 59 Wisc. 2d 1, 207 N. W. 2d 826 (1973) (father of illegitimate

must be given a hearing on termination of his parental rights); K. Davidson, R. Ginsburg and H. Kay, "Text Note: Illegitimacy and Sex Based Discrimination," Sex Based Discrimination 309-329 (1974); Note, The Emerging Constitu: al Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581 (1972).

State legislatures are systematically revising laws in order to expand the parental rights of unwed fathers. See, e.g., Fla. Stat. Ann. § 63.062 (1974 Hawaii Rev. Laws § 578-2 (Supp. 1974); S.H. Ill. Ann. Stat ch. 4, §§ 9.1-1E, 9.1-8, 9.1-12a (1975); Burns Ind. Stat. Ann. § 31-3-1-6 (Supp. 1975); Me. Rev. Stat. Ann. § 532 (Supp. 1975); Mich. Comp. Laws Ann. § 710.3a (Supp. 1973); Minn. Stat. Ann. §§ 259.24, 259.26, 259.261 (Supp. 1975); N.D. C.C.A. § 14-15-20 (1971); R.I. Gen. Laws § 15-7-5 Supp. 1974); Utah Code Ann. § 78-30-4 (Supp. 1975); Va. C § 63.1-225 (Supp. 1975); Wash. Rev. Code Ann. §§ 26.32.03 26.32.085, 26.24.190, 26.28.110 (Supp. 1974); Wisc. Stat. Ann.ch. 263, §§ 48.02 (ii), 48.42, 48.02, and 48.425 (Sup 1975).

This clear trend is consonant with national policy recognized by Congress in its adoption of the Equal Rights Amendment and in its enactment of a series of other statutes designed to overcome outmoded concepts of sex discrimination. See, e.g., Proposed Constitutional Amendment, S.J. Res. 9, 92d Cong., 1st Sess., 118 Cong. R 9568 (1972), H.R. J. Res. 208, 92d Cong., 1st Sess., 117 Cong.Rec.35782 (1971); Civil Rights Act of 1964, Title VII 42 USC § 2000(e)-5 (1974), Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1965).

The fact that Congress has not yet had the oppo tunity to winnow through the enormous federal statutory materials to carry out its clear present policy gives adde force to the argument that the vestigial remainder of such discrimination embodied in the Act should be closely revie by the courts.

Social science literature and empirical studies illustrate why courts, as well as legislatures, no longer allow legislative exclusion of fathers of illegitimates fr statutory benefits. Such discrimination is based on an archaic and overbroad stereotype of unwed fathers. Most

pregnancies result from exclusive long-term re.tionships between the father and mother. M. Sauber and E. Rubinstein, Experiences of the Unwed Mother as a Parent 27 (1965); Herzog, "Some Notes About Unmarried Fathers," 1966 Child Welfare 194; Pope, "Unwed Mother and Their Sex Partners," 29 J. of Marriage & the Family, 555, 558 (1967). Many fathers not only continue the relationship with the mother after the child's birth, Sauber and Rubinstein, supra, at 53, but also demonstrate genuine interest in and concern for their children. R. Pannor, F. Massarik, and B. Evans, The Unmarried Father 92 (1971); Chaskel, "Changing Patterns in Services for Unmarried Parents," 49 Social Casework 3, 10 (1968); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 Social Casework 11, 12 (1968).

Even those fathers not living with their children assume many of the functions of fatherhood vital to the well-being of children, including financial and emotional support. One statistical study found that between 59% to 83% of these fathers contribute money for their child's expenses and approximately 70% visit their children. Ewer, 1971 Maternal and Child Health Service, Project H-214-2, Characteristics of AAPP Unwed Fathers -- A Descriptive Study 2, Table 33

(unpublished, Div. of Research, Maternal and Child Health Service, HSMHA).

An even more striking indication of the strengt of the fathers' parental commitment is that an increasing number of illegitimate children are living with their fathe In 1970 13.9% of the children under eighteen living with single parents, that is, parents who have never been marrie lived with their single fathers, as compared to 9.2% in 19 U.S. Bur. of the Census, 1 U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summar -- Sec. 2, Table 206 (1973); id., U.S. Census of the Popula tion 1960, Table 185 (1963).

The three plaintiff families are good examples of the variety of situations in which strong familial bonds tie illegitimate children to their fathers. Ramon Fiallo's parents, although unmarried, have functioned as a family since the child's birth. Cleophus Warner and the Wilson bo have been supported financially by their fathers since birt They now depend upon their fathers to be their sole parents because of a mother's choice to live without the child in one case and the mother's death in the other.

The challenged provisions, by excluding only fathers and their illegitimate children from statutory benefits, are based upon an irrebuttable presumption that fathers do not have close family ties with their illegitimat offspring, a presumption belied by the statistical evidence, sociological evaluation of family life, and the facts in the three cases before us. Such a presumption without basis in fact is invalid. See, e.g., Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); United States Dept. of Agriculture v. Murry, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). Cf. Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

Whatever assumed basis there may once have been for such sexist presumptions no longer exists. Rationality must be viewed in the light of current knowledge. See Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed 610 (1970).

Even if we accepted the government's contention that the natural fathers of illegitimate children were

singled out by Congress to prevent spurious claims, the statutory scheme is not rationally related to that end. See Jiminez v. Weinberger, 417 U.S. 628, 634-6, 94 S.Ct.2496 2500-01, 41 L.Ed.2d 363 (1974), where the Court invalidated provisions of the Social Security Act denying children's insurance benefits to a subclass of illegitimate children because the structure of the statute was not reasonably related to the purported purpose, prevention of spurious cl

Paternity or maternity must be claimed and prove in cases involving legitimate children, legitimated children step-children and illegitimate children to the satisfaction immigration and consular officials. The burden of proof of any familial relationship is on the United States citize or permanent resident and the alien relative. Immigration authorities may require birth certificates, marriage certifi cates, baptismal certificates, school records, census record affidavits, letters, photographs, remittances, proof of cust proof of support, a blood test, personal testimony, and oth evidence. 8 C.F.R. § 204.2 (1975). The potential for spurious claims is as great for those included in the statutes' definitions of parent and child as for illegitima

children and their fathers. Women claiming to be mothers of illegitimate children and men claiming to be fathers of legitimated, legitimate, or illegitimate children in a step-child situation, and their respective children, would have as much difficulty or ease in presenting fraudulent proof as would a man claiming to be the father of an illegitimate child and his child.

And yet, quota restrictions are waived in the case of a step-child or legitimated child if paternity is proven, but a conclusive statutory presumption denies any opportunity of proof in the case of an illegitimate child. A conclusive presumption supposedly established to prevent spurious claims can not be upheld when the potential for fraud is similar for the excluded group and for groups receiving the statutory benefits. Jiminez v. Weinberger, 417 U.S. 628, 636-637, 94 S.Ct. 2496, 2501-02, 41 L.Ed. 363 (1974). Cf. U. S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct.2821, 37 L.Ed.2d 782 (1973); Vlandis v. Kline, 412 U.S. 441, 453-4, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973); Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Glona v. American Guaranty & Liability Insurance Co.,

391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed. d 441 (1968). This rigid presumption must be replaced by "more individualized means" of determining the family relationship. Turner v. Dept. of Employment Security, U.S. , , S.Ct. , L.Ed.2d (1975).

Practically speaking, the government's contention that the restrictive definition of parent is necessary to prevent spurious claims is nothing more than a plea on behalf of administrative convenience. But it has been clear for some time now that a scheme built upon administrative convenience cannot stand when invidious discrimination results. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973).

IV. Conclusion

Plaintiffs' request for summary judgment in their favor should be granted.

Dated: Brooklyn, New York
November 28 1975.

Jack B. Weinstein
U. S. D. J.

APPENDIX C

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ JAN 23 1975 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAMON MARTIN FIALLO, et al.,

Plaintiffs,

- against -

WILLIAM SAXBE, et al.,

Defendants.

74 C 1083

MEMORANDUM AND ORDER

APPEARANCES:

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(MORTON B. DICKER, ANNETTE ELSTEIN, JULIUS BIERVLIET, JOHN E. KIRKLIN, and ANITA FISHER BARRETT, of the Legal Aid Society, on the briefs)

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By: DOUGLAS J. KRAMER, Esq.
Assistant United States Attorney
Attorneys for Defendants

WEINSTEIN, D.J.

Plaintiffs are non-citizen fathers of illegitimate citizen or resident children and non-citizen illegitimate children of citizen fathers. They challenge the constitutionality of the definitions of "parent" and "child" favoring mothers over fathers found in the Immigration and Naturalization Laws, 8 U.S.C. § 1101(b)(1) and (2), and seek a three-judge court.

28 U.S.C. § 2282. Discriminations between males and females are coming under increased scrutiny. Legal distinctions once accepted are no longer constitutional in view of rapidly changing mores. See, e.g., Taylor v. Louisiana, U.S. , , Sup.Ct. , L.Ed.2d (No. 73-5744) (January 21, 1975) (separate rules on jury qualification for men and women no longer valid). For the reasons indicated below, a three-judge court must consider the issues.

Insofar as pertinent, the statute reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> ***
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> ***
>
> (2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

I. PLAINTIFFS' CONTENTIONS

Immigrants are admitted to the United States on a strict numerical quota system, which makes admission difficult, but "immediate relatives" of United States citizens, including children and parents are admitted without regard to the quota system. 8 U.S.C. § 1151(a)(b). However, fathers of illegitimate children are excluded from the definition of "parent" and illegitimate children of citizen fathers are excluded from the definition of "child". Thus if an illegitimate child is a native or naturalized United States citizen, the child's natural father cannot be admitted to the United States except via the quota system. And if the father of the illegitimate child is a naturalized or native United States citizen, the child cannot be admitted, except through the quota system. The law allows the mothers of illegitimate citizen children and the illegitimate children of citizen mothers to be admitted without regard to the quota system.

Plaintiffs claim violations of the Fifth Amendment equal protection and due process principles. They state that the law discriminates without justification on the basis of sex and illegitimacy, and establishes an invalid conclusive

presumption that there are no psychological and economic ties between illegitimate children and their fathers.

II. STANDARD FOR CONVENING THREE-JUDGE COURT

A three-judge court must be convened if the claim meets the slight burden of substantiality described in Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858-59 (1973):

> "Constitutional insubstantiality for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " [Citations omitted]

See, also, Hagans v. Lavine, 415 U.S. 528, 537-38, 94 S.Ct. 1372, 1379. (1974).

While this court must, in the interests of judicial economy, carefully scrutinize a request to convene a three-judge court (Bynum v. Connecticut Commission on Forfeited

Rights, 410 F.2d 173 (2d Cir. 1969)), the most recent case in this circuit repeats the Goosby formulation, and reiterates that a "fairly low standard applies." Finnerty v. Cowen, No. 74-1668, Slip Op. 848 (2d Cir. Dec. 16, 1974).

III. APPLICABILITY OF THE "POLITICAL QUESTION" DOCTRINE

The government argues that there is no basis for a three-judge court. It contends that the classification of aliens for the purpose of exclusion is a "political question" which courts have traditionally avoided. The courts in the past have adhered to such a policy, beginning with Choe Chan Ping v. United States, (The Chinese Exclusion Case), 130 U.S. 581, 609, 9 S.Ct. 623 (1889). In Lew Moon Sing v. United States, 158 U.S. 538, 547, 15 S.Ct. 967, 970 (1895), for example, the court concluded that:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

This position was most recently restated by the Supreme Court in Kleindienst v. Mandel, 408 U.S. 757, 92 S.Ct. 2576 (1972), a case which challenged on First Amendment grounds the Attorney General's failure to admit an advocate of Communism. See, also, Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S.Ct. 512 (1952) (upheld deportation of Communist Party members); Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737 (1954) (deportation case); Hitai v. Immigration and Naturalization Service, 343 F.2d 466, 467 (2d Cir.), cert. denied, 382 U.S. 816 (1965) (upheld special quota for Japanese immigrants); Faustino v. Immigration and Naturalization Service, 302 F.Supp. 212 (1969), aff'd. 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971) (court refused to convene a three-judge court because equal protection arguments concerning immigration classifications based upon age of child were insubstantial).

But these cases must be read in the light of the Supreme Court's most recent pronouncement on the reviewability of immigration laws in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535 (1973). The court found unconstitutional a provision in the immigration laws allowing warrantless border searches. In the face of a dissent which asserted, citing Mandel, supra, that congressional opinion as to the

constitutionality of a statute must be accepted when that statute deals with the exclusion of aliens, the majority held that "no Act of Congress can authorize a violation of the Constitution," and that in the immigration field, as in others, "a resolute loyalty to constitutional safeguards" is required. Almeida-Sanchez, supra, 413 U.S. at 272, 273, 93 S.Ct. at 2539, 2540. While the fact pattern in Almeida-Sanchez is very different from the case before this court, it is also true that none of the cases cited by the government compares to the fact pattern here.

Plaintiffs further argue that none of the cases cited by the government supports the precise proposition that the constitutionality of an immigration statute relating to the exclusion of aliens is immune from judicial review, where, as here, no foreign policy determination, incapable of being reviewed by judicially discoverable and manageable standards, is involved. Plaintiffs also assert that Congress itself in drafting the act contemplated judicial intervention to the extent necessary to bring it into accord with the Constitution. House Report No. 1365, 82d Cong., 2d Sess., at 6 (1952) ("the right to exclude or expel all aliens or any class of aliens . . . to be regulated . . . by act of Congress . . .

except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene"). Plaintiffs claim, too, that the case here is distinguishable from cases cited by the government, since it involves not merely the rights of aliens, to which a "political question" doctrine might be applied, but also the rights of United States citizens and permanent residents, although their alien relatives also benefit.

Thus, without making any comments on the merits, Almeida-Sanchez, supra, and the plaintiffs' arguments stated above make plaintiffs' claims "at least arguable" (Finnerty v. Cowen, No. 74-1668, Slip Op. 849 (2d Cir. Dec. 16, 1974)). On this line of attack the government fails to meet the heavy burden necessary for it to forestall a three-judge court.

IV. APPLICABILITY OF "CONSULAR NON-REVIEWABILITY" DOCTRINE.

The government, in its initial brief, argued that the courts could not review the classifications involved in this case under the doctrine of consular non-reviewability. United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C.Cir.), cert. denied, 279 U.S. 868, 49 S.Ct. 482 (1929); Toza-Bedoya v. Immigration and Naturalization Service, 410 F.2d 342 (9th Cir. 1969); Ticea-Gomez v. Pilliod, 193 F.Supp. 577, 582 (N.D. Ill. 1960). Plaintiffs respond, however, that consuls are not acting within any regulatory or statutory discretion with respect to plaintiffs here, since the statute requires them to exclude the plaintiffs. Thus, plaintiffs argue, there is no proper question of discretion here which would invoke the doctrine. Plaintiffs' position is at least arguable, and so the government fails to preclude a three-judge court review by this tack.

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The government argues that plaintiffs' administrative remedies have not been exhausted and thus the case is not ripe for adjudication. Plaintiffs respond that many years would have to pass before the plaintiff children reached the age they could apply for admission under the quota system, and also that a similar period of years would have to pass before plaintiff fathers would be reached under the quota. Such delays, say plaintiffs, would deprive the children of paternal nurture, since in each case here the father has the basic responsibility for the child. Plaintiffs also allege that the plaintiff fathers would not normally be admitted at all through the quota system as they lack the skills necessary for the labor certificate that must be obtained for entry through the quota

system. Thus, plaintiffs assert that except in the most abstract sense their case is fully ripe. Plaintiffs' position is at least arguable.

VI. RATIONALITY OF THE CLASSIFICATION

The government's final argument is that the classification challenged by plaintiffs is neither arbitrary nor unreasonable. The government states that classification based on illegitimacy is not per se unconstitutional. Labine v. Vincent, 401 U.S. at 536, 91 S.Ct. at 1019 (1971).

The government further states that the classification may have resulted from a possible congressional concern with the problem of fraud attendant upon a determination of paternity between fathers and their illegitimate children. The government argues that a classification designed to prevent spurious claims has a rational basis. Stanton v. Weinberger, No. 73-1959, Slip Op. (10th Cir. Sept. 3, 1974). The point obviously has merit since parturition is normally more easily proven than insemination. But whether the discrimination need be as broad as that in the statute may require further inquiry.

In any event, there is at least some basis for plaintiffs' response that the law discriminates without either compelling or rational justification against unwed fathers and their natural children on the basis of sex and illegitimacy. See, in reference to rights to raise illegitimate children: May v. Anderson, 345 U.S. 528, 533,

73 S.Ct. 840, 843 (1953); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625 (1923); in reference to rights of parents to custody and care of children: Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972); Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 1688 (1965) (Goldberg, J. concurring); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944); in reference to extension of parental rights to care for child to family not legitimated by marriage: Weber v. Aetna Cas. and Surety Co., 406 U.S. 164, 169, 92 S.Ct. 1400, 1403 (1972); Stanley v. Illinois, 405 U.S. at 651, 92 S.Ct. at 1212 (1972); Levy v. Louisiana, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511 (1968); in reference to discrimination based on legitimacy: Jimenez v. Weinberger, U.S. , 94 S.Ct. 2496 (1974); New Jersey Welfare Rights Organization v. Cahill, 416 U.S. 619, 93 S.Ct. 1700 (1973); Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872 (1973); Weber v. Aetna Cas. and Surety Co., 406 U.S. 164, 92 S.Ct. 1400 (1972); Glona v. Amer. Guaranty and Liability Ins., 391 U.S. 73, 88 S.Ct. 1515 (1968); Levy V. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942); Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd, 409 U.S. 1069, 93 S.Ct. 689 (1972); Davis v. Richardson,

342 F.Supp. 588 (D.Conn.), aff'd, 409 U.S. 1069, S.Ct. (1972); concerning discrimination on the basis of sex: Taylor v. Louisiana, U.S. , Sup.Ct. , L.Ed.2d ; Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971).

Plaintiffs contend that the law establishes an unwarranted conclusive presumption of the absence of psychological and economic ties between unwed fathers and their illegitimate children. See, Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) (concerning the presumption that all unwed fathers are neglectful parents); Cleveland Board of Education v. La Fleur, 414 U.S. 632, 644, 94 S.Ct. 791, 798 (1974) ("'permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments'").

Plaintiffs' position, in view of the case law, is at least arguable.

VII. CONCLUSION

Under the standard established in Goosby v. Osser, 407 U.S. 512, 518, 93 S.Ct. 858-59 (1973), plaintiffs' case cannot be considered wholly insubstantial, obviously frivolous,

and obviously without merit. Accordingly, a three-judge court must be convened. Plaintiffs' motion to certify the case as a class action is deferred for consideration by the three-judge court.

SO ORDERED.

Dated: Brooklyn, New York
January 23, 1975.

Jack B. Weinstein
U. S. D. J.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SOSA; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD F. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE WILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; EDWARD MAGNUSZEWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. BURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

----------x

This cause having come on to be heard before a three-judge court, the Honorable Leonard P. Moore, United States Circuit Judge, the Honorable Jack B. Weinstein, United States District Judge, and the Honorable Henry Bramwell, United States District Judge, presiding, and an opinion and order of the Honorable Leonard P. Moore, United States Circuit Judge, and the Honorable Henry Bramwell, United States District Judge, having been filed on November 28, 1975, denying the plaintiffs' motions for certification as a class action, summary judgment, and a permanent injunction, and granting judgment for the defendant, and a dissenting opinion of the Honorable Jack B. Weinstein, United States District Judge, having been filed on November 28, 1975, it is

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ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants and that the action is dismissed.

Dated: Brooklyn, New York
December 1, 1975

Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 1083

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD F CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RAMON MARTIN FIALLO, an infant by his mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, RAMON AUGUSTO RAFAEL FIALLO-SONE, CLEOPHUS RUPERT WARNER, SERGE PATRICK WARNER, an infant by his father CLEOPHUS RUPERT WARNER, TREVOR ASTON WILSON and EARL ANTONIO WILSON, infants by their Aunt LENA HUDSON and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated, the plaintiff-appellants in the above captioned action, hereby appeal to the Supreme Court of the United States from each and every part of the final order and judgment of the three judge court in the Eastern District of New York entered on December 1, 1975 denying plaintiffs motions for summary judgment, permanent injunction and class action certification, granting judgment for defendants and dismissing the action.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED: NEW YORK, NEW YORK
December 31 1975.

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

MORTON B. DICKER
JANET M. CALVO
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JOHN E. KIRKLIN
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Civil Appeals Bureau
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New York, New York 10011

Attorneys for Plaintiff-Appellants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x 74 C 1083

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service of New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

----------x

AFFIDAVIT OF SERVICE BY MAIL

JANET CALVO, being duly sworn deposes and says:

1. I am an attorney in the office of the Legal Aid Society (Kalman Finkel, Morton B. Dicker) attorney of record for Ramon Martin Fiallo, an infant by his Mother, Celia Francisca Michael Rodriguez, and Ramon Augusto Rafael Fiallo-Sone; Cleophus Rupert Warner and Serge Patrick Warner, an infant by his father, Cleophus Rupert Warner; Trevor Aston Wilson and Earl Antonio Wilson, Infants by their aunt and next friend Lena Hudson, and Arthur Cecil Wilson, on behalf of themselves and all other persons similarly situated, plaintiff-appellants, herein.

2. I served a copy of the foregoing Notice of Appeal to the Supreme Court on Edward H. Levi, individually and as Attorney General of the United States; Leonard E. Chapman, Jr., individually and as Commissioner of the Immigration and Naturalization Service; Maurice Kiley, individually and as District Director of the Immigration and Naturalization Service for New York City; Henry Kissinger, individually and as Secretary of State of the United States; Leonard Walentynowicz, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; Julio Arias, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; Catherine M. Hurley, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic, the parties thereto as follows; by depositing a copy of the Notice of Appeal to the Supreme Court in a United States mail box with first class pre paid postage addressed to attorney for defendants, David Trager, United States Attorney, Eastern District of New York 225 Cadman Plaza East,

Brooklyn, New York 11201, Attention Douglas Kramer and Solicitor General Department of Justice, Washington, D.C.20530.

JANET M. CALVO

Sworn to before me this
31st day of December 1975.

Notary Public, State of New York
Qualified in Kings County
Commission Expires March 30, 1977

APPENDIX F

STATUTES INVOLVED

Immigration and Nationality Act §101 (b)(1)(2), (8 U.S.C. §1101 (b)(1)(2)), (66 Stat. 171 (1952) as amended by 71 Stat. 639 (1957) as amended by 89 Stat. 824 (1975)), provides:

(1) The term "child"means an unmarried person under twenty-one years of age who is --

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age eighteen years at the time the marriage creating the status of the stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: Provided, That the Attorney General is satisfied that

proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status und er this Act.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

Immigration and Nationality Act §201(b), (8 U.S.C. §1151(b)), (79 Stat. 911 (1965)), provides:

The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants, shall be admitted as such, without regard to the numerical limitations in this chapter.

Immigration and Nationality Act §212(a)(14), (8 U.S.C. §1182(a)(14)), (79 Stat. 917-918 (1965)), provides:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A), (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 203(a)(8).*

* The United States Code citations for Immigration and Nationality Act §§101(a)(27)(A), 203(a)(3), (6), (8) are 8 U.S.C. §§1101(a)(27)(A), 1153(a)(3), (6), (8), respectively.

Supreme Court, U. S.
FILED
AUG 10 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1976

No. 75-6297

RAMON MARTIN FIALLO, ETC., ET AL., APPELLANTS,

v.

EDWARD H. LEVI, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

FILED MARCH 1, 1976
PROBABLE JURISDICTION NOTED JUNE 7, 1976

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1976

No. 75-6297

RAMON MARTIN FIALLO, ETC., ET AL., APPELLANTS,

v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

FILED MARCH 1, 1976
PROBABLE JURISDICTION NOTED JUNE 7, 1976

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RELEVANT DOCKET ENTRIES
NO. 74C 1083

Dates	
7/22/74	Complaint filed.
10/25/74	Defendants' Notice of Motion for dismissal of action filed.
11/27/74	Plaintiffs' Notice of Motion filed for Three-Judge Court, Class Action, and Intervention and Joinder, with Affidavits and other attachments in support.

11/27/74	Amended Complaint filed.
12/23/74	Before Weinstein, J.—Case called. Motion to dismiss argued. Decision reserved. Motion for intervention and joinder is granted. Motion for three-judge court argued and decision reserved.
1/23/75	By Weinstein, J.—Memorandum and Order dated January 23, 1975, filed that a three-judge court must be convened and that plaintiffs' motion for class action certification is deferred for consideration by three-judge court.
3/7/75	Stipulation between parties as to class action numerosity, dated February 21, 1975, with remark by Weinstein, J. dated March 6, 1975.
5/9/75	Designation of Judges dated May 7, 1975, signed by Ch. J. Kaufman of Court of Appeals, designating Judges Weinstein, Bramwell, and Cir. J. Moore pursuant to 28 U.S.C. §§2282 and 2284 filed.
8/8/75	Plaintiffs' Notice of Motion filed for Class Action Certification, Summary Judgment, and Permanent Injunction with Rule 9(g) Statement, Affidavits and other attachments in support.
8/18/75	Defendants' Notice of Motion to dismiss filed.
9/4/75	Before Weinstein, Bramwell, and Moore—Case called. Motions argued. Decision reserved.
11/28/75	By Moore and Bramweli, J.—Opinion and Order refusing to find above case unconstitutional filed.
11/28/75	By Weinstein, J.—Dissenting Opinion filed.
12/1/75	Judgment dated December 1, 1975, dismissing the complaint filed.
12/31/75	Notice of Appeal to the Supreme Court of the United States filed.
6/14/76	Certified copy of Order from the Supreme Court granting probable jurisdiction for appeal filed.
6/14/76	Certified copy of Order from the Supreme Court allowing appellants to proceed in forma pauperis filed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

—against—

WILLIAM SAXBE, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; BARBARA N. WATSON, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

CIVIL ACTION NO. 74 C 1083

AMENDED COMPLAINT — CLASS ACTION

PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202, and Rules 23, 57 and 65 of the Federal Rules of Civil Procedure to protect the rights of plaintiffs and the class under the First, Fifth and Ninth Amendments to the United States Constitution.

2. By this proceeding, the named plaintiffs, on behalf of themselves and all others similarly situated, seek a judgment declaring unconstitutional and enjoining the enforcement and operation of Immigration and Nationality Act (INA) §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)) alone and in combination with INA §§212(a)(14) (8 U.S.C. §1182(a)(14)) and INA §201(a) and (b) (8 U.S.C. §1151(a) and (b)), on their face and as applied to plaintiffs and the class.

3. Declaratory and injunctive relief are necessary and appropriate since plaintiff and plaintiff class members will otherwise suffer irreparable injury for which there is no adequate remedy at law.

4. This is a proper case for the convening of a three-judge court pursuant to 28 U.S.C. §§2282 and 2284, in that plaintiffs herein seek an injunction to restrain the defendants from the enforcement, operation and execution of an Act of Congress on the ground that said Act is repugnant to the United States Constitution.

JURISDICTION

5. Jurisdiction is conferred upon this Court by INA §279 (8 U.S.C. §1329) as a civil cause arising under the Immigration and Nationality Law; 28 U.S.C. §1361 as an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff; Section 10 of the Administrative Procedure Act (5 U.S.C. §§702–706) as a proceeding to review agency action which adversely affects or aggrieves a person within the meaning of a relevant statute; 28 U.S.C.

§1331(a), as a controversy arising under the Constitution or laws of the United States where the amount exceeds $10,000.

REGULATORY SCHEME

6. An alien who is allowed to emigrate to the United States and become a permanent resident has the right to remain in the United States indefinitely and to live, work and make a home here.

7. The Immigration Law provides two immigration schemes:

1) Immigrants from independent Western Hemisphere countries are admitted in a "first come-first serve" basis subject to an annual numerical quota for the whole Western Hemisphere (North and South America): INA §101(a)(27)(A) (8 U.S.C. §1101(a)(27)(A)) and §21(e) of Act of October 3, 1965.

2) Immigrants from Eastern Hemisphere countries are subject to annual numerical quotas for each country which are allocated on a preference system. INA §202(a), 203 (8 U.S.C. §§1152(a), 1153.) Immigrants from colonies of Eastern Hemisphere countries, even though located in the Western Hemisphere, are subject to annual numerical quotas set for colonies and allocated on the preference system.

8. "Immediate relatives" of United States citizens may be admitted without regard to any numerical quota. INA §201(a) (8 U.S.C. §1151(a)). "Immediate relatives" are defined as "the children, spouses and parents of a citizen of the United States, provided that in the case of parents, such citizen must be at least twenty-one years of age." INA §201(b) (8 U.S.C. §1151(b)).

9. Persons from both the Eastern and Western Hemisphere, subject to a numerical quota, may not become permanent residents unless the Secretary of Labor has certified to the Secretary of State that the work the alien will perform in the United States is in short supply and will not adversely affect the wages and working conditions of

United States' workers. INA §212(a)(14) (8 U.S.C. §1182(a)(14)).

10. The following are exempt from the "labor certification" requirement:

a) Persons from independent countries of the Western Hemisphere who are the parents, spouses or children of United States citizens or of permanent residents.

b) Persons from Eastern Hemisphere countries or their colonies who meet certain preference category requirements under the preference system. INA §§212(a)(14), 203(a)(1)(2)(4)(5) and (7) (8 U.S.C. §§1182(a)(14); §1153(a)(1)(2)(4)(5) and (7)).

11. The definitions of "parent" and "child" in the Immigration and Nationality Act are applied to determine whether an alien is entitled as a "parent" or a "child" to classification as an "immediate relative" or exemption from the "labor certification" requirement.

12. INA §101(b)(1) (8 U.S.C. §1101(b)(1)) defines a "child" as a legitimate child, a child legitimated under the law of his residence or domicile or under his natural father's residence or domicile before the child reaches the age of eighteen, a child in relationship to his mother, a step-child, whether or not born out of wedlock, if the marriage which creates the step-child status occurred before the child was eighteen, an adopted child if the child was adopted before age fourteen. A child born out of wedlock and not legitimated is not the "child" of his natural father within the meaning of this statutory section.

13. INA §101(b)(2) (8 U.S.C. §1101(b)(2)) defines "parent" as one who bears the relationship to a child as defined in INA §101(b)(1) (8 U.S.C. §1101(b)(1)) (see para. 12 above)). A natural father of a child born out of wedlock and not legitimated is not a "parent" within the meaning of this statutory section.

DEFENDANTS

14. Defendant William Saxbe is the Attorney General of the United States and pursuant to INA §103 (8 U.S.C. §1103) he is charged with the administration and enforcement of the immigration and nationality laws of the United States.

15. Defendant Leonard E. Chapman, Jr., is the Commissioner of the Immigration and Naturalization Service. He has authority co-extensive with that of the Attorney General to direct the administration of the Service and to enforce the immigration law, and has the power to issue regulations necessary or appropriate for the exercise of his authority, INA §103(b) (8 U.S.C. §§1103(b), 1552, 8 C.F.R. §§2.1, 100.2, 100.6).

16. Defendant Maurice Kiley is the District Director of the Immigration and Naturalization Service for New York City. He exercises powers, privileges, and duties co-extensive with those of the Commissioner with respect to the grant or denial of any application or petition submitted to the Service including those submitted on Forms I-130 and I-550, (8 C.F.R. §§100.2, 103.1(f)).

17. Defendant Henry Kissinger is the Secretary of State of the United States and pursuant to INA §104 (8 U.S.C. §1104) he is charged with the administration and enforcement of the immigration and nationality laws of the United States.

18. Defendant Barbara Watson is Administrator of the Bureau of Security and Consular Affairs in the Department of State. She is charged with any and all responsibility and authority in the administration of the Bureau and the Immigration and Nationality Act which are delegated to her by the Secretary of State. INA §104(b) (8 U.S.C. §1104(b)).

19. Julio Arias is the Director of the Visa Office in the Bureau of Security and Consular Affairs. The Visa Office supervises and controls the visa process of consular posts abroad. The Visa Office's interpretation of law is binding on consular officers.

20. Defendant Catherine M. Hurley is the Consul of the United States of America in Santo Domingo, Dominican Republic. She rejected the application by the son, RAMON MARTIN FIALLO, on behalf of his father, RAMON AUGUSTO RAFAEL FIALLO-SONE, on the ground that the

son, RAMON MARTIN FIALLO, was not the legitimate child of the father, RAMON AUGUSTO RAFAEL FIALLO-SONE. Pursuant to INA §221 (8 U.S.C. §1201) she is charged with administration and enforcement of immigration and nationality laws of the United States with regard to the issuance of visas.

NAMED PLAINTIFFS

Ramon Martin Fiallo
and Ramon Augusto Rafael Fiallo-Sone

21. Ramon Martin Fiallo is an infant citizen of the United States, born in New York, New York on January 2, 1971.

22. Celia Francisca Michel Rodriguez is the natural mother of Ramon Mart n Fiallo and brings this action in his behalf.

23. Ramon Augusto Rafael Fiallo-Sone is the natural father of Ramon Martin Fiallo and his name appears on Ramon Martin Fiallo's birth certificate.

24. Shortly after Ramon Martin Fiallo's birth, Ramon Augusto Rafael Fiallo-Sone assumed the role of primary caretaker and constant companion to his son, Ramon Martin Fiallo. He continues that role to date.

25. Celia Francisca Michel Rodriguez assumed and continues to date the role of bread-winner.

26. Ramon Fiallo-Sone and Celia Francisca Michel Rodriguez are not married.

27. Ramon Martin Fiallo is a pre-school age child and is very dependent upon and attached to his father.

28. Ramon Augusto Rafael Fiallo-Sone is a citizen of the Dominican Republic.

29. Ramon Augusto Rafael Fiallo-Sone entered the United States in December of 1964 as a visitor and was given permission to depart from the United States voluntarily.

30. A Form FS 497A, 'Preliminary Questionnaire to Determine Immigrant Status,' was submitted on behalf of Ramon Fiallo-Sone to the U.S. Consulate in the Dominican

Republic, the proper preliminary step for obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States citizen child under twenty-one.

31. Consul Catherine M. Hurley returned the Form FS 497A and wrote a letter stating that Ramon Martin Fiallo was not eligible for an immigrant visa and permanent resident status without a "labor certificate" on the basis of his relationship to his citizen son because his son was not his legitimate issue.

32. The date stamp on the returned Form FS 497A indicated that the Form had been received in the U.S. Embassy at Santo Domingo, Dominican Republic on January 25, 1974.

33. Plaintiffs, Ramon Martin Fiallo and Ramon Augusto Rafael Fiallo-Sone reside in Brooklyn, New York.

Serge Patrick Warner and Cleophus Rupert Warner

34. Cleophus Rupert Warner is a naturalized citizen of the United States of America, having been naturalized in the District Court of the United States for the Eastern District of New York, on April 26, 1966, under Certificate Number 8941869.

35. Serge Patrick Warner is the son of Cleophus Rupert Warner and was born on February 23, 1960, in the Commune De Saint-Martin, Departement de la Guadeloupe, St. Martin, French West Indies.

36. Cleophus Rupert Warner was never married to Serge Patrick Warner's natural mother, Elenore Carmelie Gibs.

37. Shortly after the birth of Serge Patrick Warner, Cleophus Rupert Warner registered as his father and acknowledged paternity and his name therefore appears on the Birth Certificate of Serge Patrick Warner.

38. Cleophus Rupert Warner has supported and maintained Serge Patrick Warner from his birth until the present time and intends to continue to do so in the future.

39. Serge Patrick Warner entered the United States as a visitor on August 22, 1969, solely with the intention of visit-

ing his father, Cleophus Rupert Warner. Shortly after Serge Warner's entry into the United States, his mother married and informed Cleophus Rupert Warner that she was moving to a new address and requested him to keep their son, Serge Patrick Warner.

40. Cleophus Rupert Warner filed a Form I-130, "Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa", with the Immigration and Naturalization Service in New York City, the proper preliminary step for obtaining an immigrant visa and permanent resident status for an unmarried child under twenty-one of a United States citizen.

41. The petition was rejected on March 2, 1972 on the grounds that it was mandatorily deniable under INA §101(b) because Serge Patrick Warner was not the legitimate or legitimated issue of Cleophus Warner.

42. Cleophus Rupert Warner also attempted to regularize Serge Patrick Warner's status by writing to the U.S. Consul in the French West Indies. In response, he was informed that he must obtain an approved I-130 Petition before the Consul would take any action.

43. Exclusion proceedings are now pending against Serge Patrick Warner.

44. Serge Patrick Warner continues to reside with his father, Cleophus Rupert Warner, in the Borough of Queens, City and State of New York. Cleophus Rupert Warner continues to support and maintain his son, Serge Patrick Warner.

45. Serge Patrick Warner desires to remain in the United States with his father, Cleophus Rupert Warner.

Trevor Aston Wilson, Earl Antonio Wilson and Arthur Cecil Wilson

46. Plaintiff Trevor Aston Wilson is a permanent resident of the United States, No. A 17 564 218.

47. Plaintiff Earl Antonio Wilson is a permanent resident of the United States, No. A 17 564 217.

48. Plaintiff Arthur Cecil Wilson is a native and citizen of Jamaica.

49. Trevor Aston Wilson was born on June 19, 1957, and his brother, Earl Antonio Wilson, was born on January 6, 1959 to Leonie (Leony) (Muckle) Moses and Arthur Cecil Wilson.

50. Arthur Cecil Wilson and Leonie (Muckle) Moses were never married.

51. Trevor Aston Wilson and Earl Antonio Wilson recognize Arthur Cecil Wilson as their father and Arthur Cecil Wilson acknowledges the paternity of Trevor Aston Wilson and Earl Antonio Wilson.

52. From the time of their births until 1968, Trevor Aston Wilson and Earl Antonio Wilson lived with and were maintained by their natural father, Arthur Cecil Wilson.

53. Subsequent to 1968, Trevor Aston Wilson and Earl Antonio Wilson have maintained a relationship with their natural father, Arthur Cecil Wilson, by visits and letters and Arthur Cecil Wilson has contributed to their support.

54. On September 15, 1974, Leonie (Leony) (Muckle) Moses died in New York City, New York.

55. Upon the death of their mother, Leonie (Leony) (Muckle) Moses, Trevor Aston Wilson and Earl Antonio Wilson requested that their father, Arthur Cecil Wilson come to the United States.

56. Arthur Cecil Wilson obtained an emergency visa and entered the United States.

57. Trevor Aston Wilson and Earl Antonio Wilson desire to stay in the United States, continue their education and eventually become citizens.

58. Trevor Aston Wilson and Earl Antonio Wilson desire and need their father, Arthur Cecil Wilson, to live with and maintain them in the United States.

59. Trevor Aston Wilson, as the oldest child, submitted a Form I-550 to the Immigration and Naturalization Service, the proper preliminary procedure for obtaining an immigrant visa and permanent resident status for a parent of a United States permanent resident unmarried child under twenty-one.

60. Arthur Cecil Wilson left the United States when the extensions he was able to obtain on his visa expired. He returned to Jamaica because without permanent resident status he could not obtain a job in the United States and he felt that in Jamaica he could work and contribute something to the support of his children. He also did not want to violate the law by overstaying the time period allowed.

61. He and his sons desire that he return to the United States as a permanent resident so he may maintain a home and family and work here.

CLASS ACTION ALLEGATIONS

62. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and in addition, Rule 23(b)(2) or in the alternative, Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

63. This class is composed of all United States citizen natural fathers and their alien children born out of wedlock and not legitimated and all United States citizen and permanent resident children born out of wedlock and not legitimated and their alien natural fathers who are denied the following statutory benefits because they fail to satisfy the statutory definitions of "parent" and "child" under the Immigration and Naionality Act:

1) the classification of a child of a United States citizen father as an "immediate relative," and

2) the exemption from the requirement of a "labor certification" of the father of a United States citizen or of a permanent resident child.

64. The class is so numerous that joinder of all members is impracticable. Rule 23(a)(1).

65. There are questions of law and fact common to the class, that is, whether the United States statutes challenged herein comport with minimal constitutional requirements under the First, Fifth, and Ninth Amendments to the United States Constitution as detailed in paragraphs 70 through 72 herein. Rule 23 (a)(2).

66. The claims of the representative plaintiffs are typical of the claims of the class. Rule 23(a)(3).

67. THE LEGAL AID SOCIETY of New York City, attorney for the plaintiffs, has legal resources and experience adequate to protect all members of the class, and the representative plaintiffs will fairly and adequately protect the interests of the class. Rule 23(a)(4).

68. In denying the status of "parent" and "child" to the plaintiffs herein pursuant to the Immigration and Nationality Act, the defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Rule 23(b)(2).

69. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action, and would create a risk of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Rule 23(b)(1)(A) and (B).

STATEMENT OF CLAIMS

70. INA §101(b)(1) and (2) (8 U.S.C. §1101 (b)(1) and (2)), alone, and in combination with INA §212(a)(14) (8 U.S.C. §1182(a)(14)), and INA §201(a) and (b) (8 U.S.C. §1151(a) and (b)), are, on their face and as applied to plaintiffs and class members, unconstitutional as violative of the equal protection principles of the Due Process Clause of the Fifth Amendment to the United States Constitution in that they discriminate against natural fathers and their children born out of wedlock and not legitimated on the basis of the father's marital status, the illegitimacy of the child and the sex of the parent without either compelling or rational justification.

71. INA §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone, and in combination with INA §212(a)(14) (8 U.S.C. §1182(a)(14)), and INA §201(a) and (b) (8 U.S.C. §1151(a) and (b)), are, on their face and as applied to plaintiffs and class members, unconstitutional as violative of the Due Process Clause of the Fifth Amendment to the United States Constitution in that they create an unwarranted conclusive presumption of the absence of strong psychological and economic ties between natural fathers and their children born out of wedlock and not legitimated.

72. INA §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone, and in combination with INA §212(a)(14) (8 U.S.C. §1182(a)(14)), and INA §201(a) and (b) (8 U.S.C. §1151(a) and (b)), are, on their face and as applied to plaintiff and class members, unconstitutional and violative of the First, Fifth and Ninth Amendments to the United States Constitution in that they seriously burden and infringe upon the rights of natural fathers and their children, born out of wedlock and not legitimated, to mutual association, to privacy, to establish a home, to raise natural children and to be raised by the natural father.

RELIEF REQUESTED

WHEREFORE, plaintiffs, on behalf of themselves and all the members of the class, respectfully pray that this Court:

1. Assume jurisdiction of this cause and convene a three-judge court pursuant to 28 U.S.C. §§2282 and 2284.

2. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring that Section 101(b)(1) and (2) of the Immigration and Nationality Act (8 U.S.C. §1101(b)(1) and (2)) alone, and in combination with INA §212(a)(14) (8 U.S.C. §1182(a)(14)) and INA §201(a) and (b) (8 U.S.C. §1151 (a) and (b)), are unconstitutional, on their face and as applied to the plaintiffs and the class herein, as violative of the First, Fifth and

Ninth Amendments to the United States Constitution in the respects detailed in this amended complaint.

4. Enter a permanent injunction restraining the defendants, their officers, agents, servants, employees, and successors in office, from:

a) enforcing, applying or relying upon INA §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone or in combination with INA §212(a)(14) (8 U.S.C. §1182(a)(14)) and INA §201(a) and (b) (8 U.S.C. §1151(a) and (b)), in their unconstitutional aspects as detailed in this amended complaint, for purposes of determining immediate relative status or exemption from labor certification requirement.

b) failing to afford the plaintiffs whatever immigrant status they would have had but for the unconstitutional application of statutes challenged herein.

5. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow plaintiffs reasonable attorneys' fees and their costs and disbursements herein and also grant them and the members of their class such additional and alternative relief as may seem to this court to be just, proper and equitable.

DATED: New York, New York
November 21, 1974

Respectfully submitted,

KALMAN FINKEL, *Attorney-in-Charge*
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MEMORANDUM AND ORDER

RAMON MARTIN FIALLO, ET AL.,
Plaintiffs

against

WILLIAM SAXBE, ET AL.,
Defendants

----------x

APPEARANCES:
JANET M. CALVO,
of the Legal Aid Society
Attorney for Plaintiffs
(MORTON B. DICKER, ANNETTE ELSTEIN, JULIUS BIERVLIET, JOHN E. KIRKLIN, and ANITA FISHER BARRETT, of the Legal Aid Society, on the briefs)

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WEINSTEIN, D. J.

Plaintiffs are non-citizen fathers of illegitimate citizens or resident children and non-citizen illegitimate children of citizen fathers. They challenge the constitutionality of the definitions of "parent" and "child" favoring mothers over

fathers found in the Immigration and Naturalization Laws, 8 U.S.C. §1101(b)(1) and (2), and seek a three-judge court. 28 U.S.C. §2282. Discriminations between males and females are coming under increased scrutiny. Legal distinctions once accepted are no longer constitutional in view of rapidly changing mores. *See, e.g., Taylor* v. *Louisiana*, U.S. , Sup.Ct. , L.Ed.2d (No. 73-5744) (January 21, 1975) (separate rules on jury qualification for men and women no longer valid). For the reasons indicated below, a three-judge cou must consider the issues.

Insofar as pertinent, the statute reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is—
>
> (A) a legitimate child; or
>
> ***
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> ***
>
> (2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

I. *PLAINTIFFS' CONTENTIONS*

Immigrants are admitted to the United States on a strict numerical quota system, which makes admission difficult, but "immediate relatives" of United States citizens, including children and parents are admitted without regard to the quota system. 8 U.S.C. §1151 (a)(b). However, fathers of illegitimate children are excluded from the definition of "parent" and illegitimate children of citizen fathers are excluded from the definition of "child". Thus if an illegitimate child is a native or naturalized United States citizen, the child's natural father cannot be admitted to the

United States except via the quota system. And if the father of the illegitimate child is a naturalized or native United States citizen, the child cannot be admitted, except through the quota system. The law allows the mothers of illegitimate citizen children and the illegitimate children of citizen mothers to be admitted without regard to the quota system.

Plaintiffs claim violations of the Fifth Amendment equal protection and due process principles. They state that the law discriminates without justification on the basis of sex and illegitimacy, and establishes an invalid conclusive presumption that there are no psychological and economic ties between illegitimate children and their fathers.

II. *STANDARD FOR CONVENING THREE-JUDGE COURT*

A three-judge court must be convened if the claim meets the slight burden of substantiality described in Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858-59 (1973):

> "Constitutional insubstantiality for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " [Citations omitted]

See, also, Hagans v. *Lavine*, 415 U.S. 528, 537-38, 94 S.Ct. 1372, 1379. (1974).

While this court must, in the interests of judicial economy, carefully scrutinize a request to convene a

three-judge court (*Bynum v. Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969)), the most recent case in this circuit repeats the *Goosby* formulation, and reiterates that a "fairly low standard applies." *Finnerty* v. *Cowen*, No. 74-1668, Slip Op. 848 (2d Cir. Dec. 16, 1974).

III. *APPLICABILITY OF THE "POLITICAL QUESTION" DOCTRINE*

The government argues that there is no basis for a three-judge court. It contends that the classification of aliens for the purpose of exclusion is a "political question" which courts have traditionally avoided. The courts in the past have adhered to such a policy, beginning with *Choe Chan Ping* v. *United States*, (The Chinese Exclusion Case), 130 U.S. 581, 609, 9 S.Ct. 623 (1889). In *Lew Moon Sing* v. *United States*, 158 U.S. 538, 547, 15 S.Ct. 967, 970 (1895), for example, the court concluded that:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

This position was most recently restated by the Supreme Court in *Kleindienst* v. *Mandel*, 408 U.S. 757, 92 S.Ct. 2576 (1972), a case which challenged on First Amendment grounds the Attorney General's failure to admit an advocate of Communism. *See, also, Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89, 72 S.Ct. 512 (1952) (upheld deportation of Communist Party members); *Galvan* v. *Press*, 347 U.S. 522, 74 S.Ct. 737 (1954) (deportation case); *Hitai* v. *Immigration and Naturalization Service*, 343 F.2d 466, 467 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (upheld special quota for Japanese immigrants); *Faustino* v. *Immigration and Naturalization Service*, 302 F.Supp. 212 (1969), *aff'd. 432 F.2d 429 (2d Cir. 1970), cert. denied*, 401 U.S. 921 (1971) (court refused to convene a three-judge court because equal protection arguments concerning immigration classifications based upon age of child were insubstantial).

But these cases must be read in the light of the Supreme Court's most recent pronouncement on the reviewability of immigration laws in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 93 S.Ct. 2535 (1973). The court found unconstitutional a provision in the immigration laws allowing warrantless border searches. In the face of a dissent which asserted, citing *Mandel, supra*, that congressional opinion as to the constitutionality of a statute must be accepted when that statute deals with the exclusion of aliens, the majority held that "no Act of Congress can authorize a violation of the Constitution," and that in the immigration field, as in others, "a resolute loyalty to constitutional safeguards" is required. *Almeida-Sanchez, supra*, 413 U.S. at 272, 273, 93 S.Ct. at 2539, 2540. While the fact pattern in Almeida-Sanchez is very different from the case before this court, it is also true that none of the cases cited by the government compares to the fact pattern here.

Plaintiffs further argue that none of the cases cited by the government supports the precise proposition that the constitutionality of an immigration statute relating to the exclusion of aliens is immune from judicial review, where, as here, no foreign policy determination, incapable of being reviewed by judicially discoverable and manageable standards, is involved. Plaintiffs also assert that Congress itself in drafting the act contemplated judicial intervention to the extent necessary to bring it into accord with the Constitution. House Report No. 1365, 82d Cong., 2d Sess., at 6 (1952) ("the right to exclude or expel all aliens or any class of aliens . . . to be regulated . . . by act of Congress . . . except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene"). Plaintiffs claim, too, that the case here is distinguishable from cases cited by the government, since it involves not merely the rights of aliens, to which a "political question" doctrine might be applied, but also the rights of United States citizens and

permanent residents, although their alien relatives also benefit.

Thus, without making any comments on the merits, *Almeida-Sanchez*, *supra*, and the plaintiffs' arguments stated above make plaintiffs' claims "at least arguable" (*Finnerty* v. *Cowen*, No. 74-1668, Slip Op. 849 (2d Cir. Dec. 16, 1974)). On this line of attack the government fails to meet the heavy burden necessary for it to forestall a three-judge court.

IV. *APPLICABILITY OF "CONSULAR NON-REVIEWABILITY" DOCTRINE.*

The government, in its initial brief, argued that the courts could not review the classifications involved in this case under the doctrine of consular non-reviewability. *United States ex rel. Ulrich* v. *Kellog*, 30 F.2d 984 (D.C. Cir.), *cert. denied*, 279 U.S. 868, 49 S.Ct. 482 (1929); *Toza-Bedova* v. *Immigration and Naturalization Service*, 410 F.2d 342 (9th Cir. 1969); *Ticea-Gomez* v. *Pilliod*, 193 F. Supp. 577, 582 (N.D. Ill. 1960). Plaintiffs respond, however, that consuls are not acting within any regulatory or statutory discretion with respect to plaintiffs here, since the statute requires them to exclude the plaintiffs. Thus, plaintiffs argue, there is no proper question of discretion here which would invoke the doctrine. Plaintiffs' position is at least arguable, and so the government fails to preclude a three-judge court review by this tack.

V. *EXHAUSTION OF ADMINISTRATIVE REMEDIES*

The government argues that plaintiffs' administrative remedies have not been exhausted and thus the case is not ripe for adjudication. Plaintiffs respond that many years would have to pass before the plaintiff children reached the age they could apply for admission under the quota system, and also that a similar period of years would have to pass before plaintiff fathers would be reached under the quota. Such delays, say plaintiffs, would deprive the children of paternal nurture, since in each case here the father has the basic responsibility for the child. Plaintiffs also allege that

the plaintiff fathers would not normally be admitted at all through the quota system as they lack the skills necessary for the labor certificate that must be obtained for entry through the quota system. Thus, plaintiffs assert that except in the most abstract sense their case is fully ripe. Plaintiffs' position is at least arguable.

VI. *RATIONALITY OF THE CLASSIFICATION*

The government's final argument is that the classification challenged by plaintiffs is neither arbitrary nor unreasonable. The government states that classification based on illegitimacy is not *per se* unconstitutional. *Labine* v. *Vincent*, 401 U.S. at 536, 91 S.Ct. at 1019 (1971).

The government further states that the classification may have resulted from a possible congressional concern with the problem of fraud attendant upon a determination of paternity between fathers and their illegitimate children. The government argues that a classification designed to prevent spurious claims has a rational basis. *Stanton* v. *Weinberger*, No. 73–1959, Slip Op. (10th Cir. Sept. 3, 1974). The point obviously has merit since parturition is normally more easily proven than insemination. But whether the discrimination need be as broad as that in the statute may require further inquiry.

In any event, there is at least some basis for plaintiffs' response that the law discriminates without e ther compelling or rational justification against unwed fathers and their natural children on the basis of sex and illegitimacy. *See*, in reference to rights to raise illegitimate children: *May* v. *Anderson*, 345 U.S. 528, 533, 73 S.Ct. 840, 843 (1953); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942); *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923); in reference to rights of parents to custody and care of children: *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 496, 85 S.Ct. 1678, 1688 (1965) (Goldberg, J. concurring); *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944); in reference to extension of parental rights to care for child to family not legitimated by marriage: *Weber* v. *Aetna Cas. and Surety Co.*, 406 U.S. 164, 169, 92

S.Ct. 1400, 1403 (1972); *Stanley* v. *Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212 (1972); *Levy* v. *Louisiana*, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511 (1968); in reference to discrimination based on legitimacy: *Jimenez* v. *Weinberger* , U.S. , 94 S.Ct. 2496 (1974); *New Jersey Welfare Rights Organization* v. *Cahill*, 416 U.S. 619, 93 S.Ct. 1700 (1973); *Gomez* v. *Perez*, 409 U.S. 535, 93 S.Ct. 872 (1973); *Weber* v. *Aetna Cas. and Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400 (1972); *Glona* v. *Amer. Guaranty and Liability Ins.*, 391 U.S. 73, 88 S.Ct. 1515 (1968); *Levy* v. *Louisiana*, 391 U.S. 68, 88 S.Ct. 1509 (1968); *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942); *Griffin* v. *Richardson*, 346 F.Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069, 93 S.Ct. 689 (1972); *Davis* v. *Richardson*, 342 F.Supp. 588 (D. Conn.), aff'd, 409 U.S. 1069, S.Ct. (1972); concerning discrimination on the basis of sex: *Taylor* v. *Louisiana*, U.S. , Sup.Ct. , L.Ed. 2d ; *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973); *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971).

Plaintiffs contend that the law establishes an unwarranted conclusive presumption of the absence of psychological and economic ties between unwed fathers and their illegitimate children. *See*, *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972) (concerning the presumption that all unwed fathers are neglectful parents); *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632, 644, 94 S.Ct. 791, 798 (1974) (" 'permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments' ").

Plaintiffs' position, in view of the case law, is at least arguable.

VII. *CONCLUSION*

Under the standard established in *Goosby* v. *Osser*, 407 U.S. 512, 518, 93 S.Ct. 858-59 (1973), plaintiffs' case cannot be considered wholly insubstantial, obviously frivolous, and obviously without merit. Accordingly, a three-judge court must be convened. Plaintiffs' motion to certify the case as a

class action is deferred for consideration by the three-judge court.

SO ORDERED.

Dated: Brooklyn, New York
January 23, 1975.

/S/ JACK B. WEINSTEIN
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DESIGNATION OF JUDGES

Having been notified by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 U.S.C. 2282 and 2284, I hereby designate the following judges, in addition to the Honorable Jack B. Weinstein, to hear and determine said cause as provided by law: Honorable Leonard P. Moore, United States Circuit Judge, United States Court of Appeals for the Second Circuit, and Honorable Henry Bramwell, United States District Court for the Eastern District of New York.

IT IS HEREBY ordered that this order be filed in the above matter in the United States District Court for the Eastern District of New York.

/S/
IRVING R. KAUFMAN
Chief Judge
United States Court of Appeals
Second Circuit

Dated: New York, New York
May 7, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOTICE OF MOTION FOR CLASS ACTION CERTIFICATION, SUMMARY JUDGMENT AND PERMANENT INJUNCTION

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavits, the plaintiffs' statement pursuant to General Rule 9 (g) of this Court, the attached exhibits, and all prior proceedings and papers herein, the undersigned will move this Three-Judge Court, before the Honorable Leonard P. Moore, the Honorable Jack B. Weinstein, and the Honorable Henry Bramwell, in Court No. 10 at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on September 4, 1975, at 2:30 p.m., or as soon thereafter as counsel can be heard,

1. for an order pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure determining that this action is to be maintained as a class action pursuant to Rule 23(a) and Rule 23(b) (2) or, in the alternative, Rule 23(b) (1) (A) or (B) of the Federal Rules of Civil Procedure, the class to be defined as all United States citizen natural fathers and their alien children born out of wedlock and not legitimated who are excluded from the definition of "parent" and "child" under INA §§101 (b) (1) and (2) (8 U.S.C. §§1101 (b) (1) and (2)) and thereby denied classification of the child as an "immediate relative" exempt from numerical quotas pursuant to INA §§201 (a) and (b) (8 U.S.C. §§1151 (a) and (b)) and all United States citizen and permanent resident children born out of wedlock and not legitimated and their alien natural fathers who are excluded from the definition of "parent" and "child" under INA §§101 (b) (1) and (2) (8 U.S.C. §§1101 (b) (1) and (2)) and thereby denied exemption of the father from a "labor certification" requirement pursuant to INA §212 (a) (14) (8 U.S.C. §§1182 (a) (14));

2. for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201 granting summary judgement in favor of the plaintiffs and class members declaring the definitions of "parent" and "child" in Sections 101 (b) (1) and (2) of the Immigration and Nationality Act (8 U.S.C. §§1101 (b) (1) and (2)) unconstitutional on their face and as applied to plaintiffs and plaintiff class members, as violative of the Due Process Clause of the Fifth Amendment to the United States Constitution, on the grounds

that the plaintiffs are entitled to a judgment as a matter of law; and

3. for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§2202 and 2282 granting a permanent injunction permanently enjoining and restraining the defendants, and their officers, agents, servants, employees and successors in office from enforcing, applying or relying on the definitions of "parent" and "child" under INA §§101 (b) (1) and (2) (8 U.S.C. §§1101 (b) (1) and (2)) to deny "immediate relative" status pursuant to INA §§201 (a) and (b) (8 U.S.C. §§1151 (a) and (b) or exemption from the "labor certification" requirement pursuant to INA §212 (a) (14) (8 U.S.C. §1182 (a) (14) to the plaintiffs and plaintiff class members, and from failing to afford the plaintiffs whatever immigrant status they would have had but for the unconstitutional application of the challenged provisions; and granting such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
August 7, 1975

Yours, etc.

KALMAN FINKEL
ATTORNEY-IN-CHARGE
THE LEGAL AID SOCIETY
CIVIL DIVISION

/S/

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TO:

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ATT: DOUGLAS J. KRAMER
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PLAINTIFFS' STATEMENT UNDER GENERAL RULE 9 (g) OF THE MATERIAL FACTS AS TO WHICH THERE EXIST NO GENUINE ISSUES TO BE TRIED

1. The definitions of "parent" and "child" in the Immigration and Nationality Act, INA §1101 (b) (1) and (2), are applied to determine whether an alien is entitled as a "parent" or a "child" to classification as an "immediate relative" under INA §1151 or exemption from the "labor certification" requirement under INA §1182 (a) (14). A child born out of wedlock and not legitimated is not the "child" of his natural father within the meaning of this statutory section.

A natural father of a child born out of wedlock and not legitimated is not a "parent" within the meaning of this statutory section.

2. The members of the asserted class are so numerous that joinder of all members is impracticable. (Exhibit L).

3. In connection with the claims of the Plaintiffs Ramon Martin Fiallo and Ramon Augusto Rafael Fiallo-Sone, it is asserted that:

a. Ramon Martin Fiallo, an infant citizen of the United States, was born in New York, New York on January 2, 1971.

b. Ramon Fiallo-Sone is the natural father of Ramon Martin Fiallo and his name appears on Ramon Martin Fiallo's birth certificate (Exhibit A).

c. Celia Francisca Michel Rodriguez, the natural mother of Ramon Martin Fiallo, recognizes Ramon Fiallo-Sone as the father of her child.

d. Ramon Fiallo-Sone and Celia Francisca Michel Rodriguez have never been married.

e. Ramon Fiallo-Sone entered the United States in December of 1964 as a visitor and was given permission to depart from the United States voluntarily.

f. Since shortly after his son's birth, Ramon Fiallo-Sone has been the primary caretaker and constant companion to his son. The son is a pre-school age child and is very dependent upon and attached to his father. Celia Francisca Michel Rodriguez assumed and continued the role of bread-winner. She believes that it is in the best interests of the child to live with his father in the United States.

g. The Fiallos cannot achieve the "parent-child" status by legitimation or adoption of the son by the father. Legitimation is not possible because of the unwillingness of the father and mother to marry each other, and the refusal of the mother to consent precludes adoption.

h. The effect of the application of the challenged status to the plaintiffs Fiallos is to require as a prerequisite for his lawful admission to this country that Mr. Fiallo obtain a labor certification, which he has sought and failed to secure in the past, and thereby to deny a United States citizen

child the companionship and care of his father in this country.

4. The proper preliminary step for obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States citizen child under twenty-one is to file a Form FS 497A. A Form FS 497A, "Preliminary Questionnaire to Determine Immigrant Status," was submitted on behalf of Ramon Fiallo-Sone to the United States Consulate in the Dominican Republic. Consul Catherine M. Hurley rejected and returned the Form FS 497A and wrote a letter stating that Mr. Fiallo must have a "labor certification" before he could be registered for immigration. (Exhibit B). She further stated that the Fiallos could not benefit from exemption from the labor certification requirement on the basis of their father-son relationship because Ramon Martin Fiallo was not legitimate or legitimated. By Consul Hurley's action the Fiallos are denied the benefit of registering for immigration, being given a priority date for an immigrant visa, and being allowed to apply for a visa without a labor certification. See 22 C.F.R. §§42.61, 42.62, 42.63. The date stamped on the returned Form FS 497A indicated that the form had been received in the U.S. Embassy at Santo Domingo, Dominican Republic on January 25, 1974. (Exhibit C).

5. In connection with the claims of Plaintiffs Trevor Aston Wilson, Earl Antonio Wilson and Arthur Cecil Wilson, it is asserted that:

a. Trevor and Earl Wilson are permanent residents of the United States, A 17 564 218 and A 17 564 217, respectively.

b. Trevor and Earl Wilson were born on June 19, 1957 and January 6, 1959, respectively (Exhibits F and G) to Arthur Cecil Wilson, and Leonie (Leony) (Muckle) Moses.

c. Arthur Cecil Wilson and Leonie (Leony) (Muckle) Moses have never married.

d. Trevor and Earl Wilson, and their maternal aunt, Lena Hudson, recognize Arthur Cecil Wilson as their father and Arthur Wilson acknowledges the paternity of Trevor and Earl Wilson.

e. From the time of their births until 1968, Trevor and

Earl Wilson lived with and were maintained by their natural father, Arthur Wilson. Subsequent to 1968, Trevor and Earl Wilson have maintained a relationship with their father by visits and letters and Arthur Wilson has contributed to their support.

f. On September 15, 1974, Leonie (Leony) (Muckle) Moses died in New York City, New York. (Exhibit H). Upon the death of their mother, Trevor and Earl Wilson requested that their father come to the United States. Arthur Wilson obtained an emergency visa and entered the United States to be with his sons.

g. Arthur Cecil Wilson left the United States when the extensions he was able to obtain on his visa expired. He returned to Jamaica because without permanent resident status he could not obtain a job in the United States and he felt that in Jamaica he could work and contribute something to the support of his children. He also did not want to violate the law by overstaying the time period allowed.

h. Trevor and Earl Wilson desire to stay in the United States, continue their education and eventually become citizens, but they desire and need their father to live with and maintain them in the United States. Their maternal aunt, Lena Hudson, believes this would be in their best interests. The Wilson children want their father to return to the United States as a permanent resident so that they can live together as a family here.

i. Mr. Wilson cannot legitimate his children by marriage to their mother, who is dead. Neither can they become his adopted children within the meaning of immigration law because they both are over fourteen years of age. INA §101 (b) (1) (E) (8 U.S.C. §1101 (b) (1) (E)).

j. Without an approved I–550, Arthur Cecil Wilson cannot obtain from the consul a priority date for an immigrant visa without the necessity of obtaining a labor certification. 22 C.F.R. §§42.61, 42.62.

k. The I–550 petition filed by Trevor Aston Wilson must be denied by reason of the application of the challenged statutes, since Trevor and his brother Earl are not legitimate or legitimated issue of their father Arthur Wilson.

l. The effect of the application of the challenged statutes

to the plaintiffs Wilsons is to subject Mr. Wilson to the labor certification requirement, which will realistically be impossible for Mr. Wilson to meet, since the sole job for which he is qualified—general handy man—is one for which a labor certification will never be furnished. See 29 C.F.R. 60.7 (Schedule B).

6. The proper preliminary procedure for a permanent resident under twenty-one to obtain an immigrant visa and permanent resident status for his father is to file a Form I–550. Plaintiff Trevor Aston Wilson submitted a Form I–550 to the Immigration and Naturalization Service.

7. In connection with the claims of the Plaintiffs Serge Patrick Warner and Cleophus Rupert Warner, it is asserted that:

a. Serge Patrick Warner is the son of Cleophus Rupert Warner, a naturalized citizen of the United States (Certificate Number 8941869), and was born on February 23, 1960, in the Commune De Saint-Martin, Departement de la Guadeloupe, St. Martin, French West Indies.

b. Cleophus Warner has never been married to Serge Patrick Warner's natural mother, Elenore Carmelie Gibs.

c. Shortly after the birth of his son, Cleophus Warner registered as his father and acknowledged paternity and his name therefore appears on the birth certificate. (Exhibit D).

d. Mr. Warner has supported and maintained his son from his birth until the present time and intends to continue to do so in the future.

e. Serge Patrick Warner entered the United States as a visitor on August 22, 1969, solely with the intention of visiting his father, Cleophus Rupert Warner. Shortly after his entry, his mother married and informed Cleophus Rupert Warner that she was moving to a new address and requested him to keep their son, Serge Warner.

f. Serge Warner, who is now paroled into this country pending exclusion proceedings, continues to reside with his father, in the Borough of Queens, City and State of New York, and his father continues to support and maintain him.

Serge Warner desires to become a permanent resident and to remain in the United States with his father.

g. Mr. Warner cannot legitimate his son by marriage to the mother because she has married another man.

h. Mr. Warner cannot obtain the status of "parent" of his son by adopting him, since under the immigration law, INA §101 (b) (1) (e) (8 U.S.C. §1101 (b) (1) (E)), the adoption must occur before the child is fourteen and Serge Warner is beyond that age.

i. When Mr. Warner attempted to regularize Serge Warner's status by writing to the United States Consul in the French West Indies, he was informed that he must obtain an approved I-130 Petition before the consul would take any action.

j. The effect of the application of the challenged provisions is to deny Mr. Warner, a United States citizen, the care, companionship, custody and maintenance of his child in the United States. Serge Warner will be forced to return to a country where there is no one to care for him.

8. The proper preliminary step for obtaining an immigrant visa and permanent resident status for the child of a United States citizen is to file a Form I-130. Cleophus Rupert Warner filed a Form I-130, "Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa," with the Immigration and Naturalization Service in New York City. The petition was rejected on March 2, 1972 on the grounds that it was mandatorily deniable under INA §101 (b) because Serge Patrick Warner was not the legitimate or legitimated issue of Cleophus Warner. (Exhibit E).

Dated: New York, New York
August 7, 1975

Respectfully Submitted,

KALMAN FINKEL
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The Legal Aid Society
Civil Division

/S/
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

AFFIDAVIT OF RAMON AUGUSTO RAFAEL FIALLO-SONE

STATE OF NEW YORK)
: SS.:
COUNTY OF QUEENS)

RAMON AUGUSTO RAFAEL FIALLO-SONE, being duly sworn, deposes and says:

1. I am the natural father of RAMON MARTIN FIALLO, an infant citizen of the United States born in New York, New York, on January 2, 1971.

2. My name appears as father on Ramon Martin Fiallo's Birth Certificate.

3. CELIA FRANCISCA MICHEL RODRIGUEZ is the natural mother of my son, Ramon Martin Fiallo.

4. I am not married to Celia Francisca Michel Rodriquez.

5. Shortly after Ramon Martin Fiallo's birth, I assumed the role of primary caretaker and constant companion to him and I continue that role to date.

6. Celia Francisca Michel Rodriguez assumed and continues to date the role of breadwinner.

7. I want to raise my son in the United States so he may obtain the full benefits of his citizenship.

8. I am a citizen of the Dominican Republic.

9. I entered the United States in December, 1964, as a visitor and was given permission to depart from the United States voluntarily.

10. A Form FS 497A, 'Preliminary Questionnaire To Determine Immigrant Status' was submitted on my behalf to the United States Consulate in the Dominican Republic, the proper preliminary step for obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States Citizen child under twenty-one.

11. Consul Catherine M. Hurley returned the Form FS 497A and wrote a letter stating that I was not eligible for an immigrant visa and permanent resident status on the basis of my relationship to my citizen son because my son is not my legitimate issue.

12. The stamp on the returned Form FS 497A indicated that the Form had been received by the United States Embassy at Santo Domingo, Dominican Republic, on January 25, 1974.

13. I reside with my son Ramon Martin Fiallo in Brooklyn, New York.

WHEREFORE, I respectfully request that the Court grant plaintiff's motion for an Order allowing the joinder of certain proposed defendants, for an Order determining this action to be maintainable as a class action; and for an order convening a three-judge court.

/S/
RAMON AUGUSTO RAFAEL FIALLO-SONE

SWORN TO BEFORE ME THIS
20 DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

AFFIDAVIT OF
CELIA FRANCISCA MICHEL RODRIQUEZ

STATE OF NEW YORK)
: SS.:
COUNTY OF QUEENS)

CELIA FRANCISCA MICHEL RODRIQUEZ, being duly sworn, deposes and says:

1. I am a legal permanent resident of the United States.

2. I am the natural mother of Ramon Martin Fiallo, an infant citizen of the United States, born on January 2, 1971, in New York, New York.

3. Ramon Augusto Rafael Fiallo-Sone is the natural father of Ramon Martin Fiallo.

4. I am not married to Ramon Augusto Rafael Fiallo-Sone.

5. Shortly after Ramon Martin Fiallo's birth, his father, Ramon Augusto Rafael Fiallo-Sone, assumed the role of primary caretaker and constant companion to Ramon Martin Fiallo and continues that role to date.

6. I assumed and continue to date the role of breadwinner.

7. I want my son to be raised in the United States so he may obtain the full benefits of his citizenship.

8. Because my son is very dependent upon his father, Ramon Augusto Rafael Fiallo-Sone, I believe that it is in his best interest if Ramon Augusto Rafael Fiallo-Sone is allowed to become a permanent resident so he may live with Ramon Martin Fiallo in the United States.

9. I bring this action in my son's behalf as his natural guardian.

WHEREFORE, I respectfully request that the Court grant plaintiff's motion for an Order allowing the joinder of

certain proposed defendants; for an Order determining this action to be maintainable as a class action; and for an Order convening a three-judge court.

/S/
CELIA FRANCISCA MICHEL RODRIGUEZ

SWORN TO BEFORE ME THIS
20 DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

AFFIDAVIT OF CLEOPHUS RUPERT WARNER

STATE OF NEW YORK)
: SS.:
COUNTY OF QUEENS)

CLEOPHUS RUPERT WARNER, being duly sworn, deposes and says:

1. I am a naturalized citizen of the United States of America, having been naturalized in the District Court of the United States for the Eastern District of New York, on April 26, 1966, under Certificate Number 8941869.

2. Serge Patrick Warner is my natural son and was born on February 23, 1960, in the Commune De Saint-Martin, Departement de la Guadeloupe, St. Martin, French West Indies.

3. I never married Serge Patrick Warner's natural mother, Elenore Carmelie Gibs.

4. Shortly after the birth of Serge Patrick Warner, I registered as his father and acknowledged paternity and my name therefore appears on the Birth Certificate of Serge Patrick Warner.

5. I have supported and maintained Serge Patrick Warner from his birth until the present time and intend to continue to do so in the future.

6. Serge Patrick Warner entered the United States as a visitor on August 22, 1969, solely with the intention of visiting me.

7. Shortly after Serge Patrick Warner's entry into the United States, his mother, Elenore Carmelie Gibs informed me by letter that she had married another man, and moved to a new address, and she requested that I keep my son, Serge Patrick Warner.

8. I filed a Form I-130, 'Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa', with the Immigration and Naturalization Service, New York City, New York, the proper preliminary step for obtaining an immigrant visa and permanent resident status for an under twenty-one unmarried child of a United States citizen.

9. The petition was rejected on March 2, 1972 on the grounds that it was mandatorily deniable under INA §101(b) because Serge Patrick Warner was not the legitimate or legitimated issue of Cleophus Warner.

10. I also attempted to regularize Serge Patrick Warner's status by writing to the U.S. Consul in the French West Indies. In response, I was informed that I must obtain an approved I-130 Petition before the Consul would take any action.

11. Serge Patrick Warner is now paroled into the United States pending exclusion proceedings.

12. Serge Patrick Warner continues to reside with me.

13. I continue to support and maintain him.

WHEREFORE, I respectfully request that this Court grant the motion for an Order permitting CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER to intervene as Plaintiffs in the above entitled action on the ground that there are common questions of law and fact and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties; for an Order allowing the joinder of certain proposed defendants; for an Order determining this action to be maintainable as a class action; and for an Order convening a three-judge court.

/S/
CLEOPHUS RUPERT WARNER

SWORN TO BEFORE ME THIS
19th DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

AFFIDAVIT OF SERGE PATRICK WARNER

STATE OF NEW YORK)
: SS.:
COUNTY OF QUEENS)

SERGE PATRICK WARNER, being duly sworn, deposes and says:

1. I am a citizen of the French West Indies.

2. I have lived with my father, Cleophus Rupert Warner, since 1969.

3. I desire to obtain permanent resident status and remain in the United States with my father.

WHEREFORE, I respectfully request that this Court grant the motion for an Order permitting CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER to intervene as Plaintiffs in the above entitled action on the ground that there are common questions of law and fact and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties; for an Order allowing the joinder of certain proposed defendants; for an

Order determining this action to be maintainable as a class action; and for an Order convening a three-judge court.

/S/
SERGE PATRICK WARNER

SWORN TO BEFORE ME THIS
22nd DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in Printing)

AFFIDAVIT OF TREVOR ASTON WILSON

STATE OF NEW YORK)
: SS.:
COUNTY OF BRONX)

TREVOR ASTON WILSON, being duly sworn, deposes and says:

1. I am a permanent resident of the United States, No. A 17 564 218.

2. I was born on January 19, 1957, in Jamaica.

3. I recognize Arthur Cecil Wilson as my natural father.

4. My mother, Leonie Muckle Moses, was never married to Arthur Cecil Wilson.

5. From my birth until 1968 when I came to the United States, I lived with my father, Arthur Cecil Wilson.

6. Subsequent to 1968 I maintained a relationship with my father by visits and letters and my father contributed to my support.

7. On September 15, 1974, my mother, Leonie Muckle Moses, died in New York City, New York.

8. Upon my mother's death, I and my brother, Earl An-

tonio Wilson, wired our father, Arthur Cecil Wilson, requesting that he come to the United States.

9. Arthur Cecil Wilson obtained an emergency visa and entered the United States.

10. Arthur Cecil Wilson left the United States when the extensions he was able to obtain on his visa expired.

11. He returned to Jamaica because without permanent resident status he could not obtain a job in the United States and he felt that in Jamaica he could work and contribute something to the support of my brother and I. He also did not want to violate the law by overstaying the time period allowed.

12. I intend to continue my education, live in and become a citizen of the United States.

13. I want and need my father, Arthur Cecil Wilson, to live with and maintain me in the United States.

14. As the older child, I submitted a Form I-550 to the Immigration and Naturalization Service in New York City, New York, the proper preliminary procedure for obtaining an immigrant visa and permanent resident status for a parent of a United States permanent resident child unmarried and under twenty-one years.

WHEREFORE, I respectfully request that this Court grant the motion for an Order permitting TREVOR ASTON WILSON and EARL ANTONIO WILSON by their next friend, LENA HUDSON, and ARTHUR CECIL WILSON, to intervene as plaintiffs in the above entitled action on the ground that there are common questions of law and fact and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties; for an Order allowing the joinder of certain proposed defendants; for an Order determining this action to be maintainable as a class action; and for an Order convening a three-judge court.

/S/
TREVOR ASTON WILSON

SWORN TO BEFORE ME THIS
19 DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

AFFIDAVIT OF EARL ANTONIO WILSON

STATE OF NEW JERSEY)
: SS.:
COUNTY OF MERCER)

EARL ANTONIO WILSON, being duly sworn, deposes and says:

1. I am a permanent resident of the United States, No. A 17 564 217.

2. I was born in Jamaica on January 6, 1959.

3. I recognize Arthur Cecil Wilson as my natural father.

4. My mother, Leonie Muckle Moses, was never married to Arthur Cecil Wilson.

5. From my birth until 1968 when I came to the United States, I lived with my father, Arthur Cecil Wilson.

6. Subsequent to 1968 I maintained a relationship with my father by visits and letters and my father contributed to my support.

7. On September 15, 1974, my mother, Leonie Muckle Moses, died in New York City, New York.

8. Upon my mother's death, I and my brother, Trevor Aston Wilson, wired our father, Arthur Cecil Wilson, requesting that he come to the United States.

9. Arthur Cecil Wilson obtained an emergency visa and entered the United States.

10. Arthur Cecil Wilson left the United States when the extensions he was able to obtain on his visa expired.

11. He returned to Jamaica because without permanent resident status he could not obtain a job in the United States and he felt that in Jamaica he could work and contribute something to the support of my brother and I. He also did not want to violate the law by overstaying the time period allowed.

12. I intend to continue my education, live in and become a citizen of the United States.

13. I want and need my father, Arthur Cecil Wilson, to live with and maintain me in the United States.

WHEREFORE, I respectfully request that this Court grant the motion for an Order permitting TREVOR ASTON WILSON and EARL ANTONIO WILSON by their next friend, LENA HUDSON, and ARTHUR CECIL WILSON, to intervene as Plaintiffs in the above entitled action on the ground that there are common questions of law and fact and that intervention will not unduly or prejudice the adjudication of the rights of the original parties; for an Order allowing the joinder of certain proposed defendants; for an Order determining this action to be maintainable as a class action; and for an Order convening a three-judge court.

/S/
EARL ANTONIO WILSON

SWORN TO BEFORE ME THIS
20th DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

AFFIDAVIT OF ARTHUR CECIL WILSON

STATE OF NEW YORK)
: S.:
COUNTY OF BRONX)

ARTHUR CECIL WILSON, being duly sworn, deposes and says:

1. That I am a citizen of Jamaica.

2. That I am the father of Trevor Aston Wilson born on June 19, 1957, and of Earl Antonio Wilson born on January 6, 1959.

3. That Leonie (Leony) Moses (Muckle) is the mother of the children in paragraph "2" above.

4. That I lived with and supported Earl and Trevor Wilson until 1968, and have maintained a relationship with them thereafter until date.

5. That Leonie Moses (Muckle) died on September 15, 1974, in New York, New York.

6. Upon the request of my children, I obtained an emergency visa and came to the United States.

7. Because I believe my children are in need of my psychological and financial support, I desire to obtain a permanent residency in the United States so that I may live with and assist them.

8. I understand that under the present immigration law, I may not do so because I was not married to Leonie Moses (Muckle), the mother of the children.

9. I believe this situation denies me my rights under the First, Fifth and Ninth Amendments to the United States Constitution, and therefore I desire to join an action now pending in the United States District Court for the Eastern District of New York, Civil action No. 74C1083.

/S/
ARTHUR CECIL WILSON

SWORN TO BEFORE ME THIS
24 DAY OF OCTOBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

AFFIDAVIT OF LENA HUDSON

STATE OF NEW YORK)
: SS.:
COUNTY OF BRONX)

LENA HUDSON, being duly sworn, deposes and says:

1. I am the maternal aunto of Trevor Aston Wilson and Earl Antonio Wilson.

2. I recognize Arthur Cecil Wilson as the natural father of Trevor Aston Wilson and Earl Antonio Wilson.

3. I believe it would be in the best interest of my nephews if their father, Arthur Cecil Wilson, lived with and maintained them.

4. As the next friend of my nephews, I bring this action in their behalf.

WHEREFORE, I respectfully request that this Court grant the motion for an Order permitting TREVOR ASTON WILSON and EARL ANTONIO WILSON, by their next friend, LENA HUDSON, and ARTHUR CECIL WILSON, to intervene as Plaintiffs in the above entitled action on the ground that there are common questions of law and fact and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, for an Order allowing the joinder of certain proposed defendants; for an Order determining this action to be maintainable as a class action, and for an Order convening a three-judge court.

/S/
LENA HUDSON

SWORN TO BEFORE ME THIS
18th DAY OF NOVEMBER, 1974.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

STIPULATION

IT IS HEREBY STIPULATED and AGREED by and among the parties hereto by their respective attorneys that if class action is otherwise appropriate, the class is so numerous that joinder of all members is impracticable.

DATED: NEW YORK, NEW YORK
February 21, 1975

MORTON B. DICKER, ESQ.
THE LEGAL AID SOCIETY
11 Park Place
NY NY 10007
Attorneys for Plaintiffs

BY:
/S/
JANET M. CALVO, ESQ.

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
Attorneys for Defendants

BY:
/S/
DOUGLAS J. KRAMER
Assistant U.S. Attorney

(EXHIBIT L)

EMBASSY OF THE
UNITED STATES OF AMERICA
Consular Section
Santo Domingo, Dominican Republic

February 22, 1974

The Legal Aid Society
Park Place Office
Eleven Park Place, New York, N. Y. 10007

Re: Ramon Augusto Fiallo

Dear Sir : Attn: Janet Calvo

The receipt is acknowledge of your recent letter which is returned herewith for your ready reference.

The Immigration and Nationality Act requires that a prospective immigrant born in the Western Hemisphere have a labor certification to be registered for immigration. The spouse, parent or minor child of an American citizen or of a legal resident alien of the United States is exempt from this requirement.

It is assumed from your letter that Mr. Fiallo and the mother of Ramon Martin were never married. It would appear therefore that the only way in which Mr. Fiallo could benefit under the immigration laws of his relationship to the child would be if the child were legitimated under the laws of the child's residence. If legitimation takes place, evidence to that affect should be submitted with Form FS-497 and birth certificate so that Mr. Fiallo may be registered on the waiting list.

Under Dominican law a child may be legitimated only by the marriage of his parents. Recognition of paternity does not serve this purpose. As Mr. Fiallo's case now stands, he needs a labor certification based on an offer of employment approved by the Department of Labor unless he can bring his case within the exception provided for the parent of an American citizen through the legitimation of his son prior to his 18th birthday.

Very truly yours,
/s/ C. M. Hurley
Catherine M. Hurley:cas
Consul of the United States of America

(We are not keeping any record of this correspondence. Should you write again, please return this letter and the attachment hereto.)

SDO
C-1 10/69

(EXHIBIT B)

DEPARTMENT OF STATE
PRELIMINARY QUESTIONNAIRE TO DETERMINE IMMIGRANT STATUS

TO: THE UNITED STATES CONSUL AT SANTO DOMINGO, DOMINICAN REPUBLIC

DO NOT WRITE IN THIS SPACE
Instructions for _____
Sent _____

INSTRUCTIONS
If a careful reading of Form DSL-852A indicates that you should file this form, please complete it and forward it to the designated consular office. This form must be completed in English and typed or printed in legible block letters. When this form is returned to you, please retain it as it must be attached to any future correspondence addressed to the consular office.

1. NAME (Last name)	(First name)	(Middle names)
Fiallo	Ramon	Augusto Rapheal

2. OTHER NAMES, ALIASES (If married woman, give maiden name and surnames of any previous spouses)
Fiallo-Sone (family name)

3. PRESENT ADDRESS (House number, street, city, state and ZIP code)
385 Weirfield Street, Brooklyn, New York 11227

4. PLACE OF BIRTH (City, state or province, country)	5. DATE OF BIRTH (Month, Day, Year)
San Pedro de Maeoris, Dominican Republic	Sept. 26, 1923

6. MARITAL STATUS ☐ Single ☐ Married ☐ Widowed ☒ Divorced

7. SEX	8. DISTINGUISHING MARKS OF IDENTIFICATION	9. Passport No. / Issued by / Issue date
☒ Male ☐ Female		

10. NAME AND BIRTHPLACE OF FATHER	11. MAIDEN NAME AND BIRTHPLACE OF MOTHER
Miguel Fiallo, Dominican Republic	Narcisa Sone, Dominican Republic

12. NAME OF SPOUSE (Maiden or family name) (First name) (Middle name)

13. SPOUSE'S BIRTHPLACE (City, State or province, Country)	14. SPOUSE'S BIRTHDATE (Month, Day, Year)	15. WILL SPOUSE IMMIGRATE WITH YOU? ☐ Yes ☐ No

16. NAME AND BIRTHPLACE OF SPOUSE'S FATHER	17. NAME AND BIRTHPLACE OF SPOUSE'S MOTHER

18. IF YOU HAVE A SPOUSE, PARENT OR CHILD WHO IS A UNITED STATES CITIZEN OR ALIEN RESIDENT, PLEASE COMPLETE THE FOLLOWING:

NAME	RELATIONSHIP	STATUS IN U. S.	PRESENT ADDRESS
Ramon Martin Fiallo	Son	Citizen	385 Weirfield Street, Brooklyn, New York

19. IF YOU HAVE ANY RELATIVES IN THE UNITED STATES OTHER THAN THOSE IDENTIFIED ABOVE, COMPLETE THE FOLLOWING:

NAME	RELATIONSHIP	STATUS IN U. S.	PRESENT ADDRESS

20. YOUR PRESENT STATUS IN THE UNITED STATES
☐ Parolee ☐ Other (specify) Visitor
☐ Indefinite voluntary departure status Alien registration number _____

21. NATIONALITY (Including former, if any)	22. PRESENT OCCUPATION OR VOCATION
DOMINICAN REPUBLIC	Draftsman

FORM FS-497A 8-69

JAN 25 PM 74

(Note: Please Print date Stamp Jan 25 PM 74)

(EXHIBIT C)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
NEW YORK, NEW YORK

REFER TO THIS FILE NO.
AID 405 331

Mr. Cleothus T. Warner
34-34 111th Street
Corona, New York

Date: MAR 4 1972

DECISION

Upon consideration, it is ordered that your visa petition submitted in behalf of Sergo Patrick Warner be denied for the following reasons:

Section 101 (b) of the Immigration and Nationality Act, as amended provides that the relationship of a child through a father must be as a result of a valid marriage and the child must be legitimate or have been legitimated.

In the absence of any evidence that you have ever been married to the boy's mother or that he has ever been legitimated, your petition is mandatorily deniable.

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

XXXX Board of Immigration Appeals in Washington, D. C., on the enclosed Forms I-290 A.

☐ Regional Commissioner on the enclosed Form I-290 B.

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with a fee of $25. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

Sincerely yours,

Enclosure(s)

District Director

(EXHIBIT E)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

NOTICE OF MOTION TO DISMISS

S I R S :

PLEASE TAKE NOTICE that upon all the papers and proceedings heretofore had herein, the defendants will move this Statutory Court, before the Honorable Leonard P. Moore, the Honorable Jack B. Weinstein, and the Honorable Henry Bramwell, in Courtroom No. 10 at the Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 4th day of September, 1975 at 2:00 p.m. in the afternoon of that day for an order, pursuant to Rules 12(b) (1) and (6) of the Federal Rules of Civil Procedure dismissing this action and for such other and different relief as to the court seems just and proper.

Dated: Brooklyn, New York
August 15, 1975

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201
By:
/S/
DOUGLAS J. KRAMER
Assistant U.S. Attorney

To: Kalman Finkel, Esq.
Attorney-in-Charge
Legal Aid Society

Janet M. Calvo

John E. Kirklin

Anita Fisher Barrett

Of Counsel

Attorneys for the Plaintiffs
11 Park Place
New York, New York 10011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

PLAINTIFFS,

—against—

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

:74 C 1083

OPINION AND ORDER

APPEARANCES: JANET CALVO, ESQ., New York, N.Y. (Kalman Finkle, Morton B. Dicker, John E. Kirklin, Anita Fisher Barett, Esqs., The Legal Aid Society) *for Plaintiffs.*

DOUGLAS J. KRAMER, Esq., Assistant U.S. Attorney, Brooklyn, New York (David G. Trager, United States Attorney, Eastern District of New York) *for Defendants.*

BEFORE: MOORE, Circuit Judge, WEINSTEIN and BRAMWELL, District Judges.

MOORE, Circuit Judge:

This is an action challenging the constitutionality of two classifications of aliens established by Congress as part of a comprehensive scheme for the admission of aliens into the United States contained in the Immigration and Nationality Act (the "Act"), Title 8 U.S.C. §1101 *et seq.* Plaintiffs specifically challenge the Act's definition of "parent" and "child" insofar as it excludes the relationship between unwed, biological fathers and their illegitimate children.[1] The effect of the exclusion is to subject the aliens in question to restrictive numerical quotas and labor certification require-

[1] The relevant section is 1101(b) (1) (2), which reads:

(1) The term "child" means an unmarried person under twenty-one years of age who is—

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

[2] 8 U.S.C. §1151(b), 8 U.S.C. §1182(a) (14).

ments which are waived for individuals who qualify as parents or children, within the meaning of the Act, of American citizens and permanent residents.[2] Plaintiffs are three sets of unwed, biological fathers and their illegitimate offspring. Both the aliens excluded by this section of the Act and the American citizens or permanent residents who are these aliens' illegitimate children or biological fathers have joined as plaintiffs in this suit; their claim is that the statutory classification is unconstitutional on its face since unwed biological fathers are excluded while unwed biological mothers are not.

A three-judge court was ordered convened, and plaintiffs have moved this Court for certification as a class action, summary judgment, and a permanent injunction. For the reasons which follow, those motions are denied, and judgment is entered for the defendant. The facts are not in dispute, and may be summarized briefly.

Ramon Fiallo, an infant and an American citizen by birth, applied—through application submitted on his behalf by his mother—to the United States Consul in the Dominican Republic to have his alien father officially declared to be his parent under the immigration laws, so that the latter might

remain permanently in the United States. Ramon Fiallo's petition was rejected, the Consul stating that Fiallo senior could not be declared the parent of an American citizen since his child was illegitimate. At present, both parents are living together in this country with their child; although the father could qualify as a parent if he legitimated his son, he and the boy's mother do not wish to marry.

Cleophus Warner, a naturalized American citizen, attempted to have his illegitimate son Serge, a citizen of the French West Indies, officially declared to be his child within the meaning of the Act by filing a petition with immigration authorities in New York, so that the boy might remain permanently with his father in this country. The petition was rejected since the boy was neither the father's legitimate nor legitimated offspring, and hence he could not meet the Act's definition of a child.

Trevor and Arthur Wilson are two brothers under twenty-one years of age who are permanent residents of the United States. After the death of their biological mother they sought to have their father, a citizen of Jamaica, officially classified as their parent so that he might qualify for permanent residency in this country. It is not clear whether their petition has already been denied, but denial is certain since the boys were never legitimated and hence their father cannot qualify as a parent under the Act.

The alien fathers and son in this action believe that their only realistic avenue of admittance to this country on a permanent basis is through classification as the parent or child of an American citizen or permanent resident. Fiallo senior has sought a labor certificate unsuccessfully in the past; Wilson senior alleges that the only job for which he is qualified—that of general handyman—is one for which the required certificate is not granted.

Subject matter jurisdiction is conferred on this Court by section 279 of the Act, Title 8 U.S.C. §1329.

A threshold question is presented with regard to Fiallo's standing to maintain this action. The administrative decision on which Fiallo bases this suit is the denial of his petition by the United States consul at Santo Domingo. Decisions of consuls granting or denying a visa have been held

to be immune from judicial review. *See, e.g., Loza-Bedoya* v. *INS*, 410 F.2d 343 (10th Cir. 1975). We note, however, that the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular nonreviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts. Plaintiff allo, therefore, is not barred from bringing this action.

Turning to the merits, we begin with the proposition that Congress' power to make rules for the admission and expulsion of aliens is exceptionally broad.

> This Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. Over no conceivable subject is the legislative power . . . more complete than it is over the admission of aliens.
> *Kliendienst* v. *Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed. 2d 633 (1972) (quotation marks and citations omitted)

The limits to the exercise of this power are few, for an alien has no constitutional right to enter or remain in this country, *Kliendienst* v. *Mandel*, *supra*. Moreover, he may be denied entrance on grounds which would be constitutionally suspect or impermissible in the context of domestic policy, namely, race,[3] physical condition,[4] political beliefs,[5] sexual proclivities,[6] age,[7] and national origin.[8]

In regulating the admission of aliens who are the spouses, parents, and children of American citizens and permanent

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[3] *Dunn* v. *INS*, 499 F.2d 856, 858 (9th Cir. 1974).
[4] *U.S.* v. *Esperdy*, 277 F.2d 537, 539 (2d Cir. 1960).
[5] *Kliendienst* v. *Mandell*, supra.
[6] *Boutilier* v. *INS*, 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed. 2d 661 (1967).
[7] *Nazareno* v. *Attorney General of the United States*, 512 F.2d 936 (D.C. Cir. 1975).
[8] *Faustino* v. *INS*, 432 F.2d 429, 431 (2d Cir. 1970), *cert. denied*, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971); *Hitai* v. *INS*, 343 F.2d 466, 467 (2d Cir. 1965), *cert. denied*, 382 U.S. 816, 86 S.Ct. 36, 15 L.Ed. 2d 63 (1965.

residents, Congress has chosen to specify the kind of relationships which are, for purposes of the immigration laws, embraced within those terms. This is a perfectly proper exercise of the Congressional responsibility to admit into this country those individuals who will be desirable additions to our populace. This includes individuals who will respect our system of government [9] and who will be useful additions to our labor force,[10] as well as those whose lives reflect personal standards of conduct important to our society's sense of morality. And while the Congress' view about what kind of marital or parental relation should be encouraged in this country may differ from the individual views held by the members of the courts, it is not for the judiciary to usurp the legislative function and replace the Congressional standards with its own.

A number of courts have ruled on the question of whether, in the immigration field, Congress may constitutionally apply its own standards with respect to the status of familial relations, and we note that this power has consistently been upheld. In *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963), this Court held that a marriage valid under state law need not be recognized as valid under the immigration laws.

> Of course Congress may adopt a federal standard of *bona fides* for the limited purpose of denying immigration priorities to persons whose marriages do not meet the standard. That standard, embodied in the Congressional understanding of the terms "marriage" and "spouse" as those terms appear in the immigration statutes is, of course, the relevant standard to apply in exclusion or deportation proceedings brought under the statutory provisions appropriate. 320 F.2d at 905.

In *Faustino* v. *INS*, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971), we held that it was not unconstitutional for Congress to permit citizen children over the age of twenty-one to bring their alien parents into this country without regard to nu-

[9] *Kliendeinst* v. *Mandel*, *supra*.

[10] *See, e.g., Buckley* v. *Gibney*, 332 F.Supp. 791 (S.D.N.Y. 1971)

merical quotas, but to deny that same privilege to citizen children under that age. Accord, *Perdido* v. *INS*, 420 F.2d 1179 (5th Cir. 1969). And in an analagous situation the District of Columbia Circuit upheld the application of one aspect of the Act's restrictive definition of child to the provision of the Act granting priority status to the sons and daughters of American citizens;[11] the effect of the holding was to deny the status of child, and hence the consequent statutory benefits, to aliens who were adopted by American citizens after their fourteenth birthdays.[12] *Nazareno* v. *Attorney General of the United States*, *supra*.

There is no doubt that Congress can establish classifications which result in the granting of benefits to one group of individuals, and their denial to another. Unless the immigration laws in question are wholly devoid of any conceivable rational purpose,[13] or are fundamentally aimed at achieving a goal unrelated to the regulation of immigration,[14] they are not unconstitutional encroachments on the right to equal protection of the laws.

At the request of the Court the Legal Aid Society representing the plaintiffs submitted a most able and exhaustive post-trial memorandum demonstrating via statistical tables and many treatises its thesis that the "courts are giving increasing legal recognition to the reality that unwed

[11] 8 U.S.C. §115 (a) (1)

[12] This is one of the several types of individuals whom we might commonly call children, but who are excluded from the Act's definition of that term. Others excluded are married children, children over twenty-one years of age, stepchildren who were over eighteen when the marriage creating their status occurred, children who were legitimated after they were eighteen. Similarly, the mothers and fathers of these individuals are not accorded the status of parents within the meaning of the Act.

[13] This Court has held that there is no need to apply the test of compelling state interest in immigration cases, since alienage is not a suspect classification for purposes of legislation regulating the admission and expulsion of aliens. *Noel* v. *Chapman*, 508 F.2d 1023, 1028 (2d Cir. 1975).

[14] In this regard we note that where the Congressional purpose of any law regarding aliens is not to regulate immigration but to invidiously discriminate against American citizens, permanent residents, or already-admitted aliens, that law cannot—in contrast to the one under consideration here—withstand constitutional scrutiny. *See Mow Sun Wong* v. *Hampton*, 500 F.2d 1031, 1036 (9th Cir. 1974); *Ramos* v. *United States Civil Service Commission*, 376 F.Supp. 361, 366 (D. Puerto Rico 1974); *cf. Graham* v. *Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 91 L.Ed. 2d 534 (1971).

fathers, like mothers, have close ties to their illegitimate children." (Post-Argument Memorandum, p. 17). From these statistics and extensive bibliography counsel draw the conclusion that "the evidence leaves no rational underpinning for discriminatory treatment of unwed natural fathers and their illegitimate children, and leaves no doubt of the patent unconstitutionality of the severe and extreme form of discrimination effectuated by the statutory provisions challenged herein." (Id. p. 21). These conclusions, plaintiffs say (Id. p. 1), demonstrate "the utter irrationality of the unwarranted conclusive presumptions effectuated by the challenged provisions. . ."

However, in view of the need to establish administrative procedures abroad which can process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed, biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable. *Cf. Faustino* v. *INS*, *supra*. For example, while the names of biological mothers routinely appear on such documents as birth certificates, this may not be the case where unmarried fathers have not acknowledged paternity officially at about the time of birth. Although such evidence would not necessarily be conclusive of one's status as a parent, nevertheless we perceive that it might be more difficult for an unrelated adult to pose as a child's mother than a child's father, where the birth certificate contains a definite name and identification of the mother only.

As a matter of law, therefore, the challenged immigration provisions are not so arbitrary or capricious as to be unconstitutional; accordingly, we conclude that plaintiffs' provocative statistics and ably documented argument, which certainly would merit Congress' attention, cannot be given weight here, lest this Court engage in the kind of policy-making activity which is properly the province of the legislative branch and not the judiciary.

Plaintiffs urge that Congress' primary purpose in exempting the parents of children of American citizens and

permanent residents from quota limitations and labor certification requirements was to enable families to be together in the United States. Without question, the policy behind the statutory enactments was a benevolent one; however, we cannot accept plaintiffs' unspoken assumption that *they*, and not Congress, should determine who constitutes the "family" which shall be allowed to enter this country on a priority basis. The statutory language is quite clear in its exclusion of unwed fathers and their illegitimate children; the fact that Congress focused upon the type of family which it determined should have the right to emigrate *en masse* to our shores[15] indicates that it may well have decided that, on balance, unwed fathers would not have such relations with their illegitimate children as would justify their being given this special exemption from the normal immigration requirements which apply to all other individuals seeking visas for permanent residency.

Even if it be assumed *arguendo* that biological, unwed fathers should under all circumstances be accorded the rights of parents, plaintiffs' constitutional claim cannot prevail. The possibility of joining one's closest family in the United States is a privilege granted by statute, not a right given by the Constitution.

> There can be no doubt but that [the appellants] as unadmitted and non-resident aliens have no constitutional right to enter and remain in this country. It is equally clear that their wives as resident aliens have no constitutional right to keep them here on the theory that the integrity of the family is protected by equal protection principles.
> *Noel* v. *Chapman*, 508 F.2d 1023, 1027 (2d Cir. 1975).

The same rule has been applied by this Court when the

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[15] Counsel for the Government persuasively suggested at oral argument that plaintiffs' position could have sobering consequences if adopted by immigration officials: an unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological father; each father could then bring over *all* of the children he has ever fathered, and thereafter *each* of *those* children could bring over his or her mother, who could then bring over all of *her* illegitimate children, etc., etc., etc.

individual seeking to challenge an alien's expulsion was the alien's United States citizen-child. *Enciso-Cardozo* v. *INS*, 504 F2d 1252, 1253 (2d Cir. 1974); *cf. Faustino* v. *INS*, *supra*. As we recognized in *Noel* v. *Chapman*, *supra* at 1027–8, the burden of separation from one's kin which occurs when an alien relative is properly excludable under our immigration laws and the American citizen or resident determines not to leave this country in order to be with the alien, is not the equivalent of the statutory destruction of the marriage or family relationship. Certainly a difficult choice is involved, but it is not one which is forbidden by the Constitution.

Plaintiffs' final argument is that the operation of the Act's definition of parent and child works a constitutionally impermissible hardship on them. While we are not unmindful of plaintiffs' plight, we have held in the past that such incidental impact on the family as the operation of the immigration laws may have is not violative of the Constitution. *Noel* v. *Chapman*, *supra; Enciso-Cardozo* v. *INS*, *supra; accord*, *Robles* v. *INS.*, 485 F.2d 100 (10th Cir. 1973); *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), *Perdido* v. *INS*, 420 F.2d 1179 (5th Cir. 1969). The law is at times painful to some, but it cannot on that basis alone be automatically invalidated as to all.

Consideration of the class action issue is unnecessary in the light of our decision.

/S/ LEONARD P. MOORE
U.S.C.J.

/S/ HENRY BRAMWELL
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

—against—

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., Individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

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DISSENTING OPINION

WEINSTEIN, District Judge (Dissenting):

I. *Issues*

The constitutionality of the definitions of "parent" and "child" in the Immigration and Naturalization Laws is challenged. Section 101 (b) (1) and (2) of the Immigration and Nationality Act (Act), Title 8 U.S.C. § 1101(b) (1) and (2) (1970). Unlike mothers and their illegitimate children, fathers, and their illegitimate children, are excluded from the definition of "parent" and "child". They are therefore ineligible for certain exemptions given citizens' relatives who are trying to enter the country: citizen fathers can not have their migrating illegitimate children exempted from numerical quotas and labor certification requirements as their "immediate relatives"; citizen and permanent resident illegitimate children can not have their migrating fathers exempted from the labor certification requirement. Insofar as pertinent, the definitional provision reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is—
> (A) a legitimate child; or
> * * *
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
> * * *
> "(2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

8 U.S.C. §1101(b) (1970).

The questions presented are (1) whether a statute making it more difficult for a parent and his child—one of whom is a citizen or permanent resident—to live together in this country solely because of the sex of the parent and the illegitimacy of the child is valid under the Fifth Amendment; and (2) whether a federal court is without power to declare such a statute invalid because it is a part of the immigration

laws. The answers should be no. The Constitutional road to equality of the sexes is open to men as well as women. Each of these plaintiffs is being deprived of a critical part of his "life . . . without due process of law." U.S. Const. Fifth Amend.; *cf. id.* Fourteenth Amend. ("equal protection of the laws").

Legal discrimination between men and women or legitimates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying them familial association, one of the most precious attributes of humanity, the courts should say what is plain: the statute is unconstitutional. The wrong to parent and to child is not reduced by characterizing the one as a "biological father", without regard for his progeny. Such disdain for filial affection is incompatible with a Constitution embodying the highest ideals of a civilized nation such as ours.

II. *Facts*

Plaintiffs Ramon Fiallo and Ramon Fiallo-Sone, son and father

Ramon Fiallo is a United States citizen, born in New York City in 1971. Although his father, Mr. Fiallo-Sone, was not married to his mother, his father's name appears on his birth certificate and his father has nurtured him since his birth. An American consul has informed Mr. Fiallo-Sone that he is not eligible for an immigrant visa or permanent residence status without a labor certificate, and that while the labor certificate requirement is waived in the case of fathers of citizen children, the waiver is only available if the child is legitimate issue. A foreign mother of an illegitimate citizen would have obtained the waiver.

Plaintiffs Serge Warner and Cleophus Warner, son and Father

Cleophus Warner, a naturalized citizen, is the unwed father of Serge Warner, who was born in the French West Indies in 1960. Mr. Warner's name appears on Serge's birth certificate, he registered as Serge's father shortly after

Serge's birth, and he has acknowledged paternity. Mr. Warner has supported his son since the child's birth. In 1969 Serge, in accord with his parents' and his own desires, entered the United States to live with his father. Father and son took steps to obtain an immigrant visa and permanent residence status for Serge in 1972. The Immigration and Naturalization laws allow citizen parents to bring alien children into the United States as "immediate relatives" without regard to the applicable numerical limitation on immigrants. Mr. Warner's petition was denied on the ground that Serge was not his legitimate issue as required by statute. Had the petition been by a mother who was a naturalized citizen, or had the child been legitimate, the petition would have been granted.

Plaintiffs Trevor and Earl Wilson and Arthur Wilson, sons and father

Trevor and Earl Wilson, who are now permanent residents of the United States, were born in Jamaica in 1957 and 1959 respectively. Arthur Wilson acknowledges the boys as his illegitimate sons. He lived with them and supported them until 1968, at which time they moved to New York City with their mother. From 1968 until 1974 Mr. Wilson maintained his relationship with his sons by visits and correspondence. He also continued to support them financially. After their mother died in 1974, the two boys asked their father to come to the United States to live with them. But Mr. Wilson was only able to stay for as long as an emergency visa allowed. Since his children are illegitimate, Mr. Wilson is unable to settle in the country without a labor certification. Were a mother in Mr. Wilson's position, or were the children legitimate, the parent would have been able to enter the country without a labor certification.

III. *Law*

The position of these three families illustrates the severe effects on American citizens and permanent residents from the Act's discrimination between male and female parents and between legitimate and illegitimate children in its

definitions of parent and child. The government does not contend that the relationship of parent to child does not exist or that a strong emotional bond between the father and child is lacking in any of these cases. Its position is that the statute compels the discrimination.

This statute, defendant insists, is not subject to judicial review. Characterizing the classification as one of aliens for the purpose of their exclusion from the country, it contends that Congressional power to exclude aliens is unfettered. *See, e.g., Chae Chan Ping* v. *United States*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); *Faustino* v. *Immigration and Naturalization Service*, 432 F.2d 429, 431 (2d Cir. 1970) (Per Curiam), *cert. denied*, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971).

But this is not a simple case of classifying aliens for the purpose of preferring some over others for entry. Rather, Congress has hinged immigrants' access to this country on their relationship to citizens and permanent residents. The question thus becomes whether a Congressional classification of citizens and permanent residents which severely disadvantages them may escape traditional constitutional scrutiny merely because it is set in alienage legislation.

If the classification were based on race, rather than gender or legitimacy, the court's power would be no different. Were Blacks, for example, excluded from the list of those American citizens who could bring in their relatives without regard to quotas, no court would let the statute stand. The Constitution, and in particular, the Fifth Amendment, protects citizens from abusive or discriminatory government action. Packaging a discriminatory classification of citizens in alienage legislation can not insulate it from judicial scrutiny.

There is ample Supreme Court precedent for intervention when enforcement of the Act burdens citizens' constitutional rights. *United States* v. *Brignoni-Ponce*, U.S. , 95 Sup.Ct.2574, L.Ed.2d (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 n.5, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). *See also, Burrafato* v. *United States Dept. of State*, F.2d (2d Cir. 1975) (dicta). The Court has recognized procedural due process and Fourth Amendment

limitations on the government's exclusion and expulsion of aliens. *See, e.g., Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49–50, 70 S.Ct. 445, 454, 94 L.Ed. 615 (1950); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 459, 464, 40 S.Ct. 566, 568, 570, 64 L.Ed. 1010 (1920); *Kaoru Yamataya* v. *Fisher*, 189 U.S. 86, 100, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903): *Cf. Lennon* v. *INS* F.2d (2d Cir. 1975).

When courts have been faced with challenges to other sections of the Act which classify aliens in terms of their relationship to citizens, they have not shrunk from traditional equal protection analysis. *See Perdido* v. *Immigration and Naturalization Service*, 420 F.2d 1179, 1181 (5th Cir. 1969); *Faustino* v. *Immigration & Naturalization Service*, 302 F.Supp. 212, 215 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 461 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971). *Cf. Noel* v. *Chapman*, 508 F.2d 1023, 1026–9 (1975).

So blatant a discrimination on the basis of gender and legitimacy is seldom found in modern statutes. Illegitimacy as a basis for denial of rights available to legitimates has been repeatedly struck down as invidious and lacking in rational basis. *See, e.g., Jiminez* v. *Weinberger*, 417 U.S. 628, 632, 94 S.Ct. 2496, 2499, 41 L.Ed.2d 363 (1974); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619, 620–621, 93 S.Ct. 1700, 1701, 36 L.Ed.2d 543 (1973) (Per Curiam); *Gomez* v. *Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973) (Per Curiam); *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164, 175–176, 92 S.Ct. 1400, 1406–1407, 31 L.Ed. 2d 768 (1972); *Glona* v. *American Guaranty and Liability Insurance*, 391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed.2d 441 (1968); *Levy* v. *Louisiana*, 391 U.S. 68, 70–72, 88 S.Ct. 1509, 1510–1511, 20 L.Ed. 2d 436 (1968); *Tanner* v. *Weinberger*, F.2d (6th Cir. 1975). Gender classifications have also been treated as invalid. *See, e.g., Turner* v. *Dept. of Employment Security*, U.S. , Sup.Ct. , L.Ed.2d (1975); *Weinberger* v. *Wiesenfeld*, U.S. , 95 S.Ct. 1225, 43 L.Ed.2d 5145)g *Stanton* v. *Stanton*, U.S. , 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Taylor* v. *Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); Ginsburg, Gender and the Constitution, 44 U.Cinn. L. Rev. 1 (1975).

The legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members. Not a shred of evidence has been produced to support the government's claim that the statutory purpose was to prevent spurious paternity claims by unwed natural fathers. As one of the provision's co-sponsors put it: "This bill is praiseworthy in its fundamental purpose—to reunite families." 103 Cong. Rec. 15497 (1957) (remarks of Senator Pastore). *See also*, H.R.Rep. No. 1199, 85th Cong., 1st Sess. 7–8 (1957); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952); 1957 U.S. Code Cong. & Ad. News 2020–2021; 103 Cong. Rec. 16719 (1957) (remarks of Senator Kennedy); 103 Cong. Rec. 16307 (1957) (remarks of Representative Rodino); *Immigration Service* v. *Errico*, 385 U.S. 214, 219–220 and in. 9, 87 S.Ct. 473, 477–478, 17 L.Ed.2d 318 (1966); *Nation* v. *Esperdy*, 239 F.Supp. 531, 534–535 (S.D.N.Y. 1965). The courts must distill the general legislative purpose from the legislative history, particularly where it supports a reasonable non-sexist interpretation. *Weinberger* v. *Wiesenfeld*, U.S. , 95 S.Ct. 1225, 1233–35, 43 L.Ed.2d 514 (1975). In view of the Congressional purpose to reunite families, there is no rational basis for the statutory classification denying the parent-child status to unwed natural fathers and their illegitimate children while automatically granting it to persons in other family relationships.

Even if Congress were motivated by a desire to discriminate against men and illegitimates in a way harmful to American citizens, the statute could not stand.

It is firmly established that a natural parent, whether father or mother, and a child, whether legitimate or not, have fundamental, constitutionally protected interests in mutual companionship and a life together.

> "The rights to conceive and to raise one's children have been deemed 'essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic

civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '[r]ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953)."

Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed. 2d 551 (1972). *See also Weinberger* v. *Salfi*, U.S. , 95 S.Ct. 2457, L.Ed.2d (1975); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 92 S.Ct. 1400, 1403, 31 L.Ed.2d 768 (1972); *Levy* v. *Louisiana*, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436 (1968).

"It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972)."

Weinberger v. *Wiesenfeld*, U.S. , , 95 S.Ct. 1225, 1235, 43 L.Ed. 2d 514 (1975).

Courts now recognize that unwed fathers, like mothers, often have strong ties of affection to their illegitimate children and desire a continuing relationship with them. *See, e.g., Miller* v. *Miller*, 504 F.2d 1067 (9th Cir. 1974) (Per Curiam) (statute permitting adoption without notice to natural father of illegitimate unconstitutional); *People ex rel. Slawek* v. *Covenant Children's Home*, 52 Ill.2d 20, 284 N.E.2d 291 (1972) (statute precluding father of illegitimate from asserting right to child and denying custody unconstitutional); *In Re Mark T.*, 8 Mich. App. 122, 154 N.W. 2d 27, 35 (Ct. App. 1967) (custody of illegitimate child awarded to father after mother's release of child for adoption) and cases cited 154 N.W.2d at 33 n. 7, 154 N.W.2d at 35 n. 13; *R.* v. *F.*, 133 N.J.Super. 396, 273 A.2d 808 (Juv. & Dom. Rel. Ct. 1971) (denying father and his natural child of right to see each other deprives them of equal protection); *Application of Juan R.*, (N.Y.Fam.Ct.), in N.Y.L.J., Oct. 28, 1975, at 1, col. 3 (putative father who has established paternity may bring action to acquire visiting rights without litigation custodial issues); *Stone* v. *Chip*, 68 Misc. 2d 134, 326 N.Y.S.2d 520 (Fam.Ct.1971) (criticizing rule that mother should have child absent proof she is unfit); *Conley* v. *Johnson*, 24 N.C.App. 122, 210 S.E.2d 88 (Ct.App. 1974) (court may order visitation rights for father of illegitimate despite mother's objection); *Hammack* v. *Wise*, 211 S.E.2d 118, 121 (W.Va. 1975) (father awarded custody of illegitimate child); *State ex rel. Lewis* v. *Lutheran Social Services*, 59 Wisc. 2d 1, 207 N.W.2d 826 (1973) (father of illegitimate must be given a hearing on termination of his parental rights); K. Davidson, R. Ginsburg and H. Kay, "Text Note: Illegitimacy and Sex Based Discrimination," Sex Based Discrimination 309–329 (1974); Note, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581 (1972).

State legislatures are systematically revising laws in order to expand the parental rights of unwed fathers. *See e.g.*, Fla. Stat. Ann. § 63.062 (1974); Hawaii Rev. Laws § 578–2 (Supp. 1974); S.H. Ill. Ann. Stat. ch. 4, §§ 9.1–1E, 9.1–8, 9.1–12a (1975); Burns Ind. Stat. Ann. § 31–3–1–6 (Supp. 1975); Me. Rev. Stat. Ann. § 532 (Supp. 1975); Mich. Comp. Laws Ann. § 710.3a (Supp. 1973); Minn. Stat. Ann. §§ 259.24, 259.26, 259.261 (Supp. 1975); N.D. C.C.A. § 14–15–20 (1971); R.I. Gen. Laws § 15–7–5 Supp. 1974); Utah Code Ann. § 78–30–4 (Supp. 1975); Va. Code § 63.1–225 (Supp. 1975); Wash. Rev. Code Ann. §§ 26.32.030, 26.32.085, 26.24.190, 26.28.110 (Supp. 1974); Wisc. Stat. Ann.ch. 263, §§ 48.02 (ii), 48.42, 48.02, and 48.425 (Supp. 1975).

The clear trend is consonant with national policy recognized by Congress in its adoption of the Equal Rights Amendment and in its enactment of a series of other statutes designed to overcome outmoded concepts of sex discrimination. *See, e.g.*, Proposed Constitutional Amendment, S.J. Res. 9, 92d Cong., 1st Sess., 118 Cong. Dec. 9568 (1972), H.R. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. 35782 (1971); Civil Rights Act of 1964, Title

VII, 42 USC § 2000(e)–5 (1974), Equal Pay Act of 1963, 29 U.S.C. §206(d) (1965).

The fact that Congress has not yet had the opportunity to winnow through the enormous federal statutory materials to carry out its clear present policy gives added force to the argument that the vestigial remainder of such discrimination embodied in the Act should be closely reviewed by the courts.

Social science literature and empirical studies illustrate why courts, as well as legislatures, no longer allow legislative exclusion of fathers of illegitimates from statutory benefits. Such discrimination is based on an archaic and overbroad stereotype of unwed fathers. Most pregnancies result from exclusive long-term relationships between the father and mother. M. Sauber and E. Rubinstein, Experiences of the Unwed Mother as a Parent 27 (1965); Herzog, "Some Notes About Unmarried Fathers," 1966 Child Welfare 194; Pope, "Unwed Mother and Their Sex Partners," 29 J. of Marriage & the Family, 555, 558 (1967). Many fathers not only continue the relationship with the mother after the child's birth, Sauber and Rubinstein, *supra*, at 53, but also demonstrate genuine interest in and concern for their children. R. Pannor, F. Massarik, and B. Evans, The Unmarried Father 92 (1971); Chaskel, "Changing Patterns in Services for Unmarried Parents," 49 Social Casework 3, 10 (1968); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 Social Casework 11, 12 (1968).

Even those fathers not living with their children assume many of the functions of fatherhood vital to the well-being of children, including financial and emotional support. One statistical study found that between 59% to 83% of these fathers contribute money for their child's expenses and approximately 70% visit their children. Ewer, 1971 Maternal and Child Health Service, Project H–214–2, Characteristics of AAPP Unwed Fathers—A Descriptive Study 2, Table 33 (unpublished, Div. of Research, Maternal and Child Health Service, HSMHA).

An even more striking indication of the strength of the fathers' parental commitment is that an increasing number of illegitimate children are living with their fathers. In 1970

13.9% of the children under eighteen living with single parents, that is, parents who have never been married, lived with their single fathers, as compared to 9.2% in 1960. U.S. Bur. of the Census, 1 U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary—Sec. 2, Table 206 (1973); *id.*, U.S. Census of the Population 1960, Table 185 (1963).

The three plaintiff families are good examples of the variety of situations in which strong familial bonds tie illegitimate children to their fathers. Ramon Fiallo's parents, although unmarried, have functioned as a family since the child's birth. Cleophus Warner and the Wilson boys have been supported financially by their fathers since birth. They now depend upon their fathers to be their sole parents because of a mother's choice to live without the child in one case and the mother's death in the other.

The challenged provisions, by excluding only fathers and their illegitimate children from statutory benefits, are based upon an irrebuttable presumption that fathers do not have close family ties with their illegitimate offspring, a presumption belied by the statistical evidence, sociological evaluation of family life, and the facts in the three cases before us. Such a presumption without basis in fact is invalid. *See, e.g., Cleveland Bd. of Ed.* v. *LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *United States Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973); *Vlandis* v. *Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). *Cf.* Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

Whatever assumed basis there may once have been for such sexist presumptions no longer exists. Rationality must be viewed in the light of current knowledge. *See Turner* v. *United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970).

Even if we accepted the government's contention that the natural fathers of illegitimate children were singled out by Congress to prevent spurious claims, the statutory scheme is not rationally related to that end. See *Jiminez* v. *Weinberger*, 417 U.S. 628, 634–6, 94 S.Ct.2496, 2500–01, 41

L.Ed.2d 363 (1974), where the Court invalidated provisions of the Social Security Act denying children's insurance benefits to a subclass of illegitimate children because the structure of the statute was not reasonably related to the purported purpose, prevention of spurious claims.

Paternity or maternity must be claimed and proven in cases involving legitimate children, legitimated children, step-children and illegitimate children to the satisfaction of immigration and consular officials. The burden of proof of any familial relationship is on the United States citizen or permanent resident and the alien relative. Immigration authorities may require birth certificates, marriage certificates, baptismal certificates, school records, census records, affidavits, letters, photographs, remittances, proof of custody, proof of support, blood test, personal testimony, and other evidence. 8 C.F.R. § 204.2 (1975). The potential for spurious claims is as great for those included in the statutes' definitions of parent and child as for illegitimate children and their fathers. Women claiming to be mothers of illegitimate children and men claiming to be fathers of legitimated, legitimate, or illegitimate children in a step-child situation, and their respective children, would have as much difficulty or ease in presenting fraudulent proof as would a man claiming to be the father of an illegitimate child and his child.

And yet, quota restrictions are waived in the case of a step-child or legitimated child if paternity is proven, but a conclusive statutory presumption denies any opportunity of proof in the case of an illegitimate child. A conclusive presumption supposedly established to prevent spurious claims can not be upheld when the potential for fraud is similar for the excluded group and for groups receiving the statutory benefits. *Jiminez* v. *Weinberger*, 417 U.S. 628, 636–637, 94 S.Ct. 2496, 2501–02, 41 L.Ed. 363 (1974). *Cf. U.S. Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 93 S.Ct.2821, 37 L.Ed.2d 782 (1973); *Vlandis* v. *Kline*, 412 U.S. 441, 453–4, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973); *Gomez* v. *Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Glona* v. *American Guaranty & Liability In-*

surance Co., 391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed.2d 441 (1968). This rigid presumption must be replaced by "more individualized means" of determining the family relationship. *Turner* v. *Dept. of Employment Security*, U.S. , , S.Ct. , L.Ed.2d (1975).

Practically speaking, the government's contention that the restrictive definition of parent is necessary to prevent spurious claims is nothing more than a plea on behalf of administrative convenience. But it has been clear for some time now that a scheme built upon administrative convenience cannot stand when invidious discrimination results. *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973).

IV. *Conclusion*

Plaintiffs' request for summary judgment in their favor should be granted.

Dated: Brooklyn, New York
November 28, 1975.

/S/ JACK B. WEINSTEIN

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER: TREVOR ASTON WILSON and EARL ANTONIO WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State, JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic.

Defendants.

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This cause having come to be heard before a three-judge court, the Honorable Leonard P. Moore, United States Circuit Judge, the Honorable Jack B. Weinstein, United States District Judge, and the Honorable Henry Bramwell, United States District Judge, presiding, and an opinion and order of the Honorable Leonard P. Moore, United States Circuit Judge, and the Honorable Henry Bramwell, United States District Judge, having been filed on November 28, 1975, denying the plaintiffs' motions for certification as a class action, summary judgment, and a permanent injunction, and granting judgment for the defendant, and a dissenting opinion of the Honorable Jack B. Weinstein, United States District Judge, having been filed on November 28, 1975, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants and that the action is dimisssed.

Dated: Brooklyn, New York
December 1, 1975

/S/ LEWIS ORGEL
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title omitted in printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RAMON MARTIN FIALLO, an infant by his mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, RAMON AUGUSTO RAFAEL FIALLO-SONE, CLEOPHUS RUPERT WARNER, SERGE PATRICK WARNER, an infant by his father CLEOPHUS RUPERT WARNER, TREVOR ASTON WILSON and EARL ANTONIO WILSON, infants by their Aunt LENA

HUDSON and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated, the plaintiff-appellants in the above captioned action, hereby appeal to the Supreme Court of the United States from each and every part of the final order and judgment of the three judge court in the Eastern District of New York entered on December 1, 1975 denying plaintiffs motions for summary judgment, permanent injunction and class action certification, granting judgment for defendants and dismissing the action.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED: NEW YORK, NEW YORK
December 31, 1975.

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

/S/ JANET M. CALVO
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Attorneys for Plaintiff-Appellants

(Affidavit of Service omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 75–6297

Ramon Martin Fiallo, etc., et al.,
Appellants,

v.

Edward H. Levi, Individually and as Attorney General of the United States, et al.

APPEAL from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is set for oral argument in tandem with No. 75–5952.

June 7, 1976

SUPREME COURT OF THE UNITED STATES

No. 75–6297

Ramon Martin Fiallo, etc., et al.,

Appellants,

v.

Edward H. Levi, Individually and as Attorney General of the United States, et al.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 7, 1976

Supreme Court, U. S.
FILED
MAY 18 1976
MICHAEL RODAK, JR., CLERK

No. 75-6297

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6297

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, dismissing appellants' constitutional challenge to classifications established by Congress in Sections 101(b)(1) and 101(b)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(b)(1) and 1101(b)(2), for the admission of aliens into the United States (J.S. App. A, B; 406 F. Supp. 162).

1. Congress has determined to grant special immigration preference status to aliens who are "children" or "parents" of American citizens and resident aliens, within the meaning of the Immigration and Nationality Act of 1952. Aliens who qualify

under this statutory parent-child relationship may enter the United States independent of any applicable quota or numerical limitations, 8 U.S.C. 1151(b), and may secure an immigrant visa without a labor certification, 8 U.S.C. 1182(a)(14).

The terms "child" and "parent" are defined in Sections 101(b)(1) and (2) of the Act. Included in this definition, and thus accorded a status that facilitates their being allowed to live together in this country, are a legitimate or legitimated child and his parent, a stepchild and stepparent, and an illegitimate child seeking preference by virtue of his relationship to his adopted mother or to his unwed natural mother. Illegitimate children seeking preference by virtue of their relationship to their natural fathers are not included within the statutory definition of "child." Similarly, the preference does not extend to natural fathers of illegitimate children who are citizens or resident aliens of the United States.

Appellant Ramon Fiallo is a citizen of the United States and appellants Trevor and Arthur Wilson are aliens permanently residing in this country. All are illegitimate, minor children who attempted to have their natural fathers (who are aliens) admitted to the United States under the immigration preference accorded a "parent" by Section 101(b)(2). Appellant Cleophus Warner is a naturalized United States citizen who sought to have his illegitimate, minor son admitted to this country as a permanent resident under the preference accorded a "child" by Section 101(b)(1).[1/] The Immigration and Naturalization Service denied the petitions on the ground that the son in each case was not the legitimate or legitimated offspring of the father and that the statutory definition of "parent" and "child" had therefore not been satisfied.

1/ Also named as appellants, and as plaintiffs below, are the father of appellants Fiallo and Trevor and Arthur Wilson and the son of appellant Warner. The circumstances surrounding appellants' immigration status are set forth in more detail in the opinion of the district court (J.S. App. A 2-3).

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Appellants thereupon brought this suit, alleging that Sections 101(b)(1) and (2) of the Act abridged their constitutional right to equal protection of the laws by excluding unwed natural fathers (but not unwed natural mothers) from the immigration preference. They sought to enjoin the enforcement of those provisions insofar as they operated to exclude appellants from the immigration preference granted other parents and children. A three-judge district court, convened pursuant to 28 U.S.C. 2282 (J.S. App. C), granted judgment for the government and dismissed the action. The court held, with one judge dissenting, that the classifications established by the Act were a proper exercise of Congress' extensive authority over the admission of aliens. The court concluded in addition that Congress could rationally exclude aliens whose lives did not "reflect personal standards of conduct important to our society's sense of morality" (J.S. App. A 5), that the provisions excluding aliens claiming to be unmarried, natural fathers and their illegitimate children foreclosed an avenue for numerous fraudulent claims that could pose "extremely difficult problems of investigation and proof" (id. at 8), and that the provisions in issue facilitated the fair administration of the Act as a whole.

ARGUMENT

The decision of the district court is correct and is supported by principles of immigration law that have long been accepted by this Court. There is no necessity for plenary review.

1. As this Court stated in Galvan v. Press, 347 U.S. 522, 531, the proposition that "the formulation of [policies pertaining to the entry of aliens] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." The Court reaffirmed this in Kleindienst v. Mandel, 408 U.S. 753, 766:

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> The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." * * * "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

Hence, while distinctions based on sex and legitimacy might be suspect if embodied in domestic legislation,[2] Congress is free to employ those and similar criteria in determining what status to accord various classes of aliens seeking to enter the United States. See Harisiades v. Shaughnessy, 342 U.S. 580, 597 (Frankfurter, J., concurring). Accordingly, aliens may be denied preferential admission, or excluded from this country altogether, on the basis of race (Dunn v. Immigration and Naturalization Service, 499 F.2d 856, 858 (C.A. 9), certiorari denied, 419 U.S. 1106) or other "immutable" characteristics such as age (Nazareno v. Attorney General, 512 F.2d 936 (C.A.D.C.), certiorari denied, 423 U.S. 832)and national origin (Noel v. Chapman, 508 F.2d 1023 (C.A. 2), certiorari denied, 423 U.S. 824) and they may be barred because of their sexual proclivities (Boutilier v. Immigration and Naturalization Service, 387 U.S. 118) or political beliefs (Kleindienst v. Mandel, supra, 408 U.S. at 762). See J.S. App. A 5.[3]

2/ But cf. Labine v. Vincent, 401 U.S. 532 (classification based on illegitimacy upheld)and Kahn v. Shevin, 416 U.S. 351 (classification based on sex upheld).

3/ See also The Japanese Immigrant Case, 189 U.S. 86; Faustino v. Immigration and Naturalization Service, 432 F.2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; Perdido v. Immigration and Naturalization Service, 420 F.2d 1179 (C.A. 5); Talanoa v. Immigration and Naturalization Service, 397 F.2d 196 (C.A. 9). Contrary to appellants' suggestion (J.S. 20-21), this Court's decisions in Almeida-Sanchez v. United States, 413 U.S. 266, and United States v. Brignoni-Ponce, 422 U.S. 873, do not represent an inroad upon this consistent recognition of the plenary power of Congress to determine the conditions under which classes of aliens may be admitted into the country. Those cases involve the procedures that the government may undertake, consistent with the Fourth Amendment, to stem the illegal entry of aliens into the United States, not the power of Congress to determine which alien

(Footnote continued on next page)

2. In view of Congress' plenary power over the admission of aliens, its enactments are not to be measured against a "compelling interest" test or other test suggested by appellants. Nonetheless, the challenged provisions of the Act are rational and further legitimate governmental interests.

At the outset, we note, as did the district court (J.S. App. A 9-10), that appellants' exclusion from the preference accorded to a "parent" and "child," as those terms are defined in the Act, was not a legislative oversight. On the contrary, it is apparent from the precise wording of Sections 101(b)(1) and (2) that Congress, in considering the problem of illegitimacy and special preferences in the admission of aliens, made a deliberate choice to include unwed mothers and their offspring and to deny the benefit to unwed fathers and their illegitimate children.

While the provisions granting exemptions to certain "parents" and "children" were, in general, designed to serve the humanitarian purpose of family unity (see Immigration and Naturalization Service v. Errico, 385 U.S. 214, 219-220) neither the language nor the history of the Act supports appellants' contention (J.S. 17) that "the exclusive purpose of Congress [was] to maintain or reunite family units, legitimate or otherwise, which include a United States citizen or permanent resident member * * *." To the contrary, large classes of persons commonly thought of as "children" are excluded from the Act's definition of the term: all children,

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(Footnote continued from preceding page)

entries are legal and which are not. Indeed, Almeida-Sanchez explicitly reaffirmed the undoubted authority of Congress to exclude aliens, 413 U.S. at 272, and Brignoni-Ponce (citing Kleindienst v. Mandel, supra) noted the "broad congressional power over immigration" but explained that "this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." 422 U.S. at 884.

regardless of age, who are married; all children who are more than twenty-one years of age; stepchildren who were older than eighteen when the marriage creating their status occurred; children who were legitimated after they were eighteen; and children adopted after the age of fourteen. Similarly, parents of these children are not "parents," within the meaning of Section 101(b)(2), for the purpose of securing special immigration preferences by virtue of their relationship to American citizens or permanent residents. Furthermore, the Act not only creates numerous categories of children and parents who are not granted privileged status, but also establishes several modified privileges relating to "parents" and "children" that depend on a number of other factors having little relation to family unity.[4/] In light of this elaborate scheme, appellants' claim that Congress inadvertently omitted them from the preferred categories of aliens is untenable.[5/]

The challenged provisions also advance legitimate substantive and procedural government interests. One rational basis for the preference exception was noted by the district court (J.S. App. A 5):

> [It] is a perfectly proper exercise of Congressional responsibility to admit into this country those individuals who will be desirable additions to our populace. This includes individuals who will respect our system of government and who will be useful additions to our labor force, as well as those whose lives reflect personal standards of conduct important to our society's sense of morality. (Footnotes omitted).

4/ For example, a resident alien "parent" will confer on his "child" either a derivative priority date, 22 C.F.R. 42.62, if the "child" is a "special immigrant" (8 U.S.C. 1101(a)(27)), or a preference, 8 U.S.C. 1153, if the child is subject to 8 U.S.C. 1151(a), though the child still must enter under the applicable numerical limitation.

5/ It is also inconsistent with appellants' contention that the challenged provisions amount to an unconstitutional "irrebuttable presumption." See p. 7, infra.

Moreover, Congress could properly have determined to limit the preference in a manner that would avoid difficult administrative problems (see Weinberger v. Salfi, 422 U.S. 779, 780) and would diminish the opportunities for fraud (J.S. App. A 8):

> [I]n view of the need to establish administrative procedures abroad which can process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed, biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable. Cf. Faustino v. INS, supra. For example, while the names of biological mothers routinely appear on such documents as birth certificates, this may not be the case where unmarried fathers have not acknowledged paternity officially at about the time of birth. Although such evidence would not necessarily be conclusive of one's status as a parent, nevertheless we perceive that it might be more difficult for an unrelated adult to pose as a child's mother than a child's father, where the birth certificate contains a definite name and identification of the mother only.

3. Appellants' contention (J.S. 20) that the Act embodies an unconstitutional "irrebuttable presumption"--that an illegitimate child and his father are never a "viable family unit"--also is insubstantial. As we have noted above, Congress did not intend to grant an immigration preference to every alien who was part of a "viable family unit" with an American citizen or resident alien, nor, despite appellants' claim (J.S. 19), did it "conclude" that unwed fathers never maintain close ties to their children while presuming that unwed mothers always do. Rather, Congress determined to grant immigration preferences to selected categories of aliens for a variety of reasons, some relating to the alien, some to his relatives in this country, and some for the convenience of immigration officials here and overseas.

Nor is this case analogous to Jimenez v. Weinberger, 417 U.S. 628, and similar cases upon which appellants rely (J.S. 20). The statutes in those cases purported to grant benefits to all persons

who suffered from certain conditions (e.g., pregnancy or dependency) that were determined to require relief, but excluded individuals who in fact labored under those handicaps by an irrebuttable presumption that they did not. By contrast, the preference at issue here does not presume to alleviate every adversity based on the separation of an alien's family, and depends not on the existence of any particular factual condition or characteristic (such as the closeness of a family unit) but solely on the class of applicant. As discussed earlier, Congress excluded large groups of alien children and parents, without regard to the degree of family unity that could be demonstrated, and had ample reason for excluding categories such as those occupied by appellants from the benefits of Sections 101(b)(1) and (2) of the Act.

We realize, as did the district court (J.S. App. A 5, 9), that the Act may work hardships in individual cases. However, Congress has not barred aliens such as appellants from immigrating to the United States. The fact that an individual is an illegitimate child or the father of such a child is not a basis for exclusion under the Act. Appellants, like other aliens, therefore remain free to immigrate to this country, subject to appropriate quota and other restrictions, and may be eligible for other types of relief from the Attorney General.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
WILLIAM G. OTIS,
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MAY 1976.

JUN 3 PAGE 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

NO. 75-6297

Supreme Court, U. S.
FILED
JUN 1 1976
MICHAEL RODAK, JR., CLERK

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend, LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Appellants,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION
TO APPELLEES' MOTION TO AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6297

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION

TO APPELLEES' MOTION TO AFFIRM

The Government's motion to affirm the judgment below in this case should be denied, and this appeal should be given plenary consideration by this Court upon full briefing and oral argument by the parties. A summary affirmance of this case will inevitably be interpreted as conclusively holding that the courts are totally powerless to review the constitutionality of <u>any</u> Congressional enactment which relates to the admission of aliens, no matter how extreme and egregious be the discrimination which is enacted. This case demonstrates the total unacceptability of that view. At least in the unique circumstances of this case, the Courts must have the power to invalidate patently unconstitutional immigration statutes relating to the admission of aliens where, as here, there is involved: (1) primarily the statutory

and constitutional rights not of aliens but of United States citizens and permanent residents; (2) not an absolute exclusion of an entire group of aliens, but rather disparate treatment between individuals within a particular group of admissible aliens; (3) considerations which are fully susceptible to judicial resolution; and (4) a classification which affects procedural as well as substantive constitutional rights and discriminates doubly on grounds of sex and illegitimacy which have repeatedly been condemned by this Court. Because of the unique coalescing of these factors in the context of the instant case, the reversal of the judgment below does not require this Court to reconsider, much less overrule, the cases cited by the Government which have discussed the assertedly broad power of Congress to legislate in this area of immigration law.

The statutes challenged herein were designed primarily to secure certain statutory rights for United States citizens and legal permanent residents. The statutory benefit enjoyed by the alien is wholly dependent upon and derivative from the citizen or permanent resident relative.[1] In Almeida-Sanchez v. United States, 413 U.S. 266,272 (1973) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court explicitly held that where the constitutional rights of United States citizens are at stake, "no Act of Congress can authorize a violation of the Constitution,"

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[1] Thus, if the challenged statutes were declared unconstitutional appellant Serge Warner, a minor alien, would not have a right to enter this country unless his father Cleophus Warner, a U.S. citizen, affirmatively exercised his right to petition for Serge's entry.

even in the field of immigration law. In contrast, the cases cited by the Government did not primarily concern the rights of United States citizens and permanent residents.

Even if only the rights of aliens were involved here, this case would nonetheless be significantly different from those cases upon which the Government relies. Assuming arguendo that Congress has the broad power to determine which group of aliens should be excluded and which should be admitted, once Congress makes those choices, individuals within a particular group cannot constitutionally be subjected to different treatment on the basis of criteria wholly unrelated to any legitimate government interest. Accord, Francis v. Immigration and Naturalization Service, _____F. 2d _____ (2 Cir., No. 74-2245, March 9, 1976).

The language of the cases cited by the Government which refers to the assertedly broad power of Congress over the admission of aliens should not be distorted out of the context of the facts of those cases[2] to strip the courts of their traditional responsibility to safeguard and secure the Constitutional rights of the parties who come before them. The concept that a whole area of law is immune from judicial review of its constitutionality is an extreme aberration which undermines the constitutional function of the Court as a co-equal branch of our tripartite government with the

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[2] An examination of those cases discloses that, dictum aside, the cases were decided on narrow grounds which are inapplicable here. In Harisiades v. Shaughnessy 342 U.S. 580 (1951), the Court merely deferred to Congressional judgment as to whether alien Communists were a threat to the national security of this country. Under the historical conditions of the time, the Court felt that Congress was reasonable in its determination that there was a threat from Communist power without and within the United States. Also, Galvan v. Press, 347 U.S. 522(1953). The Japanese Immigrant (footnote 2 cont'd next page)

(Footnote 2, cont'd.)

Case, 189 U.S. 86 (1902) determined that a law excluding paupers or persons likely to become a public charge did not abrogate a treaty with Japan. Kleindienst v. Mandel, 408 U.S. 753 (1972) held that a citizen's First Amendment rights could not compel the admission of a particular Communist alien who was otherwise excludable on the basis of a stated facially legitimate and bona fide reason. Boutilier v. Immigration and Naturalization Service 387 U.S. 118 (1967) held that the term "psychopathic personality" is not void for vagueness and includes homosexuals.

Contrary to the Government's contention, Dunn v. Immigration and Naturalization Service 499 F. 2d 856 (9 Cir., 1974) cert. den. 419 U.S. 1106 (1975), did not determine that an alien can be excluded on the basis of race. Rather, the Court determined there, as in Faustino v. Immigration and Naturalization Service 432 F. 2d 429 (2 Cir., 1970) cert. den. 401 U.S. 921 (1971), that differential treatment between aliens from the Western and Eastern Hemispheres involved foreign policy considerations and was rational. Faustino, supra and Perdido v. Immigration and Naturalization Service 420 F. 2d 1179 (5 Cir., 1969) held that it was rational to treat adult children, over twenty-one years of age, differently from minor children, under twenty-one years of age. Contrary to the Government's contention, Noel v. Chapman 508 F. 2d 1023 (2d Cir., 1975), cert. den., did not decide that discrimination on the basis of national origin is allowable. Rather, the Second Circuit Court of Appeals determined that a policy of the executive regarding the expulsion of aliens was justiciable and subject to equal protection review but held that a policy which granted stays to alien spouses of citizens but not to alien spouses of legal permanent residents was rational.

Nazareno v. Attorney General 512 F. 2d 936 (C.A.D.C., 1975) cert. den. 423 U.S. 832 (1975) and Talanoa v. Immigration and Naturalization Service 397 F. 2d 196 (9 Cir., 1968) involved questions of statutory interpretation, not a constitutional challenge to an immigration statute. Nazareno, supra, did not uphold discrimination on the basis of age, but rather held that an unmarried adopted adult did not meet the statutory definition of a son or daughter. Talanoa held that an exemption from an employment certificate for Western Hemisphere aliens was not applicable to an alien who was a citizen of the South Pacific Island of Tonga.

unique responsibility to be the ultimate interpreter of the Constitution. United States v. Nixon, 418 U.S. 683 (1974); Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803). This unique role of the Court has been well recognized by Congress itself[3]:

> It has been repeatedly held that the right to exclude or expel all aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare;that this power to exclude and expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution,to intervene.
>
> --House Report 1365,82nd Cong., 2d Sess., p.6 (1952) (emphasis supplied).

The Government may not, by the mere assertion that this case involves the admission of aliens, erect an impenetrable barrier to this Court's determination of the merits of Plaintiffs' constitutional claims, when a careful analysis discloses that the requirements of justiciability are fully satisfied here. Cf. United States v. Nixon, supra. A determination of justiciability "does not depend on...surface inquiry,"[4] United States

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3 In any event, Congress could not, even by express act, immunize legislative or executive decisions from all constitutional review. Johnson v. Robison, 415 U.S. 361, 366-7 (1974); Weinberger v. Salfi, 422 U.S. 779 (1975).

4 Even cases involving foreign policy or the war power are not necessarily immune from judicial inquiry.
"There are sweeping statements to the effect that all questions touching foreign relations are political questions...Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186 at pg. 211 (1962). (footnote 4 cont'd next page)

. . .

v. Nixon, supra, 418 U.S. at 693, and "is itself a delicate exercise in constitutional interpretation," United States v. Nixon, supra, 418 U.S. at 704. The judiciary will take the unusual step of completely acceding to the judgment of the executive or the legislative branch of government only when a "discriminating inquiry into the precise facts and posture of the particular case" results in a clear finding that the resolution of the issues in the case turns on standards that defy judicial application.[5] Baker v. Carr, 369 U.S. 186, 217 (1962).

This Court has repeatedly determined the validity of statutory provisions, such as are challenged herein, which discriminate on the basis of sex and illegitimacy, and has thus clearly found such issues to be resolvable by judicially manageable standards. This case is no different. It involves no non-justiciable considerations which defy judicial resolution, such as foreign policy concerns or a clearly expressed Congressional choice to exclude or expel a certain group of aliens who are specifically and clearly perceived to pose a grave threat to the national security, e.g., Harisiades v. Shaughnessy,

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4 (cont'd.) "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." "[E]ven the war power does not remove constitutional limitation." United States v. Robel, 389 U.S. 258, at 263-264.(1967).

5 Similarly, in the field of immigration this Court engaged in discriminating statutory and constitutional analysis, rather than apply "'the vague and illusory but often repeated formula that Congress "by occupying the field" had excluded from it all state legislation' (citation omitted)". De Canas v. Bica, ____U.S. ____, 44 U.S.L.W. 4235, 4238 n.8 (1976).

. . .

supra, or to the general welfare of the country, e.g., Boutilier v. Immigration and Naturalization Service, supra.[6]

As fully demonstrated in plaintiff's Jurisdictional Statement, the challenged classification is wholly irrational when measured against the actual Congressional purpose as evidenced by the Act's legislative history. Jurisdictional Statement, pages 12-17. Jiminez v. Weinberger, 417 U.S. 628 (1974); Weinberger v. Wiesenfeld, ____U.S. ____, 43 L.Ed. 2d 514 (1975). The Government attempts to avoid the impact of plaintiffs' argument by contending that the conceded Congressional purpose to reunite families is vitiated by the fact that individuals other than the plaintiffs and plaintiff class members are also excluded from the operative definition of "parent" and "child." The Government's argument is wholly ingenuous, however, since those other exclusions from the "parent" — "child" definition are irrelevant to the consideration of the rationality of the challenged discriminatory exclusion of unwed natural fathers and their illegitimate children.[7] The Government's position is further undermined by the analysis which led this Court to condemn the classifications challenged in Jiminez v. Weinberger, 417 U.S. 628 (1974), and Weinberger

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6 It requires no extended argument to conclude that the challenged provisions in no way involve Congress' determination of the course of this country's relations with foreign governments. It is equally self-evident that "illegitimacy" was not perceived by Congress to pose a threat to the national security or welfare, since neither illegitimate children nor their unwed fathers are totally excludable from the United States and other groups of illegitimate children and their unwed fathers are accorded the benefits of the statutory right at stake in this case. Thus, for example, illegitimate children in relation to their mothers and unwed fathers who happen to live in a country or state which allows them to legitimate their children without marrying the children's mothers are included within the statutory definition of "child" and "parent."

7 (See next page)

. . .

v. Wiesenfeld, ____ U.S. _____, 43 L.Ed. 2d 514 (1975). In those cases this Court was not distracted from an evaluation of the primary purpose of the provisions as reflected in the legislative history merely because Congress had chosen to also deny the benefits in question to groups of persons other than the plaintiffs therein.[8]

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7 For example, the question of whether it is rational to exclude persons over twenty-one from the definition of"child" must be determined on its own merits and is wholly irrelevant to the separate question of whether it is rational to exclude from that same definition illegitimate children in relation to their fathers.

8 In Jiminez, supra, this Court determined that the primary purpose of the challenged statute was to provide support for dependents of a disabled wage earner and that it was therefore a violation of equal protection to exclude some illegitimate children from receipt of benefits. The challenged statute excluded as well other classes of individuals such as married children, children over 18 who were not full-time students, and step-children of less than a year. 42 U.S.C. §§402(d); 416(e). Similarly, the challenged statute which was invalidated in Weinberger v. Wiesenfeld, supra, for unconstitutional sex discrimination also classified persons on bases other than sex--for example, marital status and age of the child under care. 42 U.S.C.§§402(g), 416(e). Yet this Court nonetheless looked to the legislative history to determine the actual purpose of the statutory scheme.

. . .

The plaintiffs have amply demonstrated in their Jurisdictional Statement, pages 15-19, that the asserted Congressional objective of preventing spurious claims, which was advanced in the Court below, is a wholly hypothetical and speculative Congressional purpose which cannot be invoked to sustain the constitutionality of the challenged provision. Now, for the first time, the Government, in its motion to affirm, conjures up considerations of "morality" as the purported purpose of the statutory discrimination, in light of which this Court is asked to affirm the judgment below. The short answer to the Government's new tact is that the "morality" objective is a wholly specious one which finds no support in the legislative history. Further, the speculative "morality" purpose is contradicted by the statutory scheme itself. If Congress were legislating a moralistic repugnance against unwed parents and their illegitimate offspring, it would have been expected to completely exclude all such persons in blanket fashion from this country. However, this it has no done. First, illegitimate children and their parents, including unwed fathers and their children, are not totally barred from this country under the challenged scheme.[9] Second, not all unwed parents and their illegitimate children are denied the statutory right at issue here. Unwed natural

---

9 Although unwed fathers and their illegitimate children are not totally barred by law from this country by not being included within the statutory definition of"parent" and "child," they are in effect precluded from being united as a family in this country because of the extreme difficulty of satisfying the restrictive numerical quota and labor certification requirements from which a "parent" and "child" are exempted. See Jurisdictional Statement, pages 5-10.

mothers and their children, for example, are included within the definition of "parent" and "child," and their unification in this country is thus realistically made possible. Third, not even all unwed natural fathers and their illegitimate children are denied the statutory right, since it is granted, for example, to an unwed father and his child who come from a country which allows subsequent legitimation by means other than marriage to the mother of the child. Finally, even if notions of "morality" did constitute the actual purpose of the challenged classifications, this Court has held that discrimination against an illegitimate child or his parent is not constitutionally justified as a means of eradicating or punishing the "sin" of illegitimacy. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968).

Stripped of rhetoric and conjecture, the Government's position is that the challenged provisions are rational in light of "archaic and overbroad generalizations" concerning sex-and-illegitimacy linked characteristics, i.e., that illegitimate children and their natural fathers cannot constitute viable family units while a parent and a legitimate or legitimated child, a step-child, or adopted child, or an unwed natural mother and her illegitimate child invariably do constitute viable family units. Such stereotyping on the basis of sex and the status of birth plainly cannot sustain the constitutionality of the challenged discrimination. Weinberger v. Wiesenfeld, ____U.S. ____, 43 L.Ed. 2d 514 (1975); Stanton v. Stanton, ____U.S. ____, 43 L.Ed. 2d 688 (1975); Taylor v. Louisiana, ____ U.S. ____, 42 L.Ed. 2d 690 (1975);

Jiminez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971)[10]. The discrimination here is especially pernicious because it operatively denies unwed fathers and their illegitimate children the fundamental procedural right to demonstrate the existence of a viable family unit which is merely presumed for each of the family relationships which is recognized automatically by the statute. See Jurisdictional Statement, pages 19-20, and cases cited therein. Cf. Wong Yang Sung v. McGrath, 339 U.S. 33 (1949).

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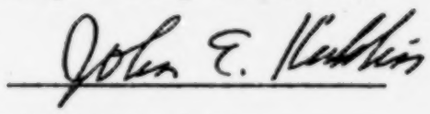
10 Weinberger v. Salfi, 422 U.S. 779 (1975), cited by the Government, is inapposite here. In Salfi, Mr. Justice Rehnquist, writing for the majority, went to great lengths to demonstrate the existence of an actually expressed and strongly held Congressional purpose to avoid the abuse of sham marriages, in light of which the nine-month-duration-of-relationship requirement of the Social Security Act was found to be rational. In contrast, the statutory provisions challenged here lack any rational basis in light of actual Congressional purpose. The total irrelevance of Salfi to the outcome here is underscored by focusing on what was not involved in that case. By the statute upheld in Salfi, Congress legislated by means of a broad prophylactic rule applied even-handedly to all categories of claimants, without picking and choosing among affected persons according to their sex or illegitimacy. It is this additional invidious element of double-barrelled sex and illegitimacy discrimination which distinguishes this case from Salfi. Indeed, had Salfi involved the imposition by Congress of the nine-month-duration-of-relationship requirement on surviving spouses of one sex and not the other, on the basis of sexual stereotyping, then the result plainly would have been different.

CONCLUSION

For the reasons stated above and in appellants' Jurisdictional Statement, appellants respectfully request that this Court deny the Government's motion to affirm and note probable jurisdiction in this case.

Dated: New York, New York
May 28, 1976

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-6297

----------x

RAMON MARTIN FIALLO, et al.,

Appellants,

-against-

EDWARD H. LEVI, et al.,

Appellees.

----------x

AFFIDAVIT OF SERVICE BY MAIL

Anita Fisher Barrett, being duly sworn, deposes and says:

1. I am one of the attorneys from The Legal Aid Society for plaintiff-appellants herein.

2. Pursuant to Supreme Court Rule 33, I served a copy of Appellants' Brief in Opposition to Appellees' Motion to Affirm dated May 28, 1976, on defendants-appellees herein by depositing a copy of said Brief in a United States mail box with first class pre-paid postage addressed to attorney for defendants-appellees, David Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, 11201, and Solicitor General, Department of Justice, Washington, D.C., 20530, on the 28th day of May, 1976.

ANITA FISHER BARRETT

SWORN TO BEFORE ME THIS
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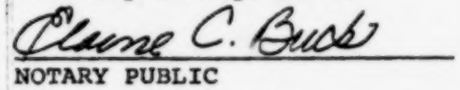

NOTARY PUBLIC

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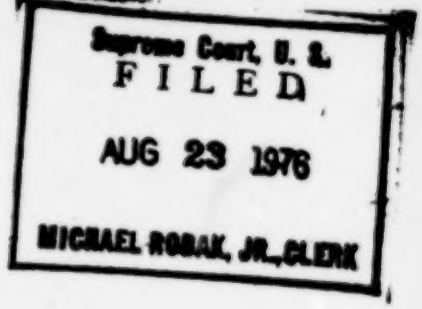
IN THE

Supreme Court of the United States

OCTOBER TERM, 1976



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Appellants,

v.

EDWARD H. LEVI, individually and as Attorney General of the United States, *et al.*,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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103 Congressional Record 16301 (1957)	33
103 Congressional Record 16307 (1957)	33
103 Congressional Record 16719 (1957)	33

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Miscellaneous:	
H. Biller, *Paternal Deprivation* (1974)	28
C. Bowerman, D. Irish, H. Pope, *Unwed Motherhood: Personal and Social Consequences* and Partial Report of Projects #006 and #189, Social Security Administration, Division of Research and Statistics, Institute for Research in Social Science, University of North Carolina, Chapel Hill (1966)	26,27
Chaskel, "Changing Patterns in Services for Unmarried Parents", 49 *Social Casework* 3 (1968)	28
Chaskel, "Unmarried Mother: Is She Different?", 46 *Child Welfare* 65 (1967)	26,27
P. Ewer, Final Report, HSMHA, Maternal And Child Health Service, *Project H-214-2, Characteristics of AAPP Unwed Fathers – A Descriptive Study, 1971,* unpublished, obtained from Division of Research, Maternal and Child Health Service, HSMHA, 5600 Fishers Lane, Room 12A-11, Rockville, Md. 20852	26,27,28
Herzog, "Some Notes About Unmarried Fathers", 45 *Child Welfare* 194 (April, 1966)	26,27
M. Hunt, *Sexual Behavior in The 1970's* (1974)	27
Kaduskin, "Single Parent Adoption: An Overview",44 *Social Services* 263 (1970)	28
Kinsey, Pomeroy, Martin & Gebhard, *Sexual Behavior in the Human Female* (1953)	27
Kinsey, Pomeroy, Martin, *Sexual Behavior in the Human Male* (1948)	27
Knight, "Conference for Pregnant Unwed Teenagers", 65 *Journal of Nursing* 126 (July, 1965)	26,27,28
Kotelchuck, Zelazo, Kagan, Spelke, "Infant Reaction to Parental Separations When Left With Familiar and Unfamiliar Adults", 126 *The Journal of Genetic Psychology* 255 (June, 1975)	28

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D. Lynn, *The Father: His Role in Child Development* (1974) 28

New York Times, July 29, 1969, at 58, col. 1 26

R. Pannor, F. Massarik, B. Evans, *The Unmarried Father* (1971) 26,27

H. Pope, "Unwed Mothers and their Sex Partners", 29 *Journal of Marriage and the Family* 555 (1967) 26,27

Ross, Kagan, Zelazo, "Separation Protest in Infants in Home and Laboratory," 11 *Developmental Psychology* 256 (1975) 28

M. Sauber and E. Rubinstein, *Experiences of the Unwed Mother As a Parent*, Community Council of Greater New York (1965) 26,27

Sauber, "The Role of the Unmarried Father", 4 *Welfare in Review* 15 (Nov., 1966) 26,27

Spelke, Zelazo, Kagan, and Kotelchuck, "Father Interaction and Separation Protest", 9 *Developmental Psychology* 83 (1973) 28

U.S. Bureau of the Census, *1 U.S. Census of the Population, 1970, Characteristics of the Population Pt. 1, U.S. Summary* - Sec. 2, Table 206 and App. B (1973) 27,28

Vener & Stewart, "Adolescent Sexual Behavior in Middle America Revisited: 1970-1973", 36 *Journal of Marriage and the Family* 728 (1974) 27

Vincent, "Unmarried Fathers", in *Marriage and the Family in the Modern World* 294 (R. Calvan ed. 1969) 26,27

Wessel, "A Physician Looks At Services for Unmarried Parents", 49 *Social Casework* 11 (1968) 26

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the divided three-judge District Court for the Eastern District of New York is reported at 406 F. Supp. 162.

JURISDICTION

By judgment entered on December 1, 1975, a divided three-judge District Court of the Eastern District of New York, convened pursuant to 28 U.S.C. §§2282 and 2284, granted judgment for the defendants and dismissed plaintiffs' action challenging the constitutionality of statutory provisions of the Immigration and Nationality Act. The Notice of Appeal to this Court was timely filed by the plaintiffs on December 31, 1975. The Jurisdictional Statement was filed in this Court on March 1, 1976. On June 7, 1976, this Court noted probable jurisdiction over the appeal.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional validity under the First, Fifth, and Ninth Amendments to the United States Constitution of Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §201(b) (8 U.S.C. § 1151(b)) and Immigration and Nationality Act §212(a)(14) (8 U.S.C. §1182(a)(14)). The verbatim text of these Constitutional provisions and statutes is set forth in Appendix A to this brief.

QUESTION PRESENTED

Whether the provisions of the Immigration and Nationality Act which define "parent" and "child" unconstitutionally discriminate, in violation of the First, Fifth, and Ninth Amendments to the United States Constitution, against United States citizen and legal permanent resident illegitimate children and fathers of illegitimate children, and their alien fathers and children, by denying them, solely on the basis of the gender of the parent and the illegitimate birth status of the child, the procedural due process opportunity afforded to other United States citizens and permanent residents and their alien parents and children to establish the existence of their family relationship, and as a result abriding their constitutionally fundamental interests in family association and a life together in this country and in the privileges of their citizenship and residency.

STATEMENT OF THE CASE

A. Statutory Scheme

Generally, an alien seeking to enter the United States as a legal permanent resident must satisfy restrictive numerical quota and labor certification requirements.[1]

[1] Immigrants from independent Western Hemisphere countries are admitted on a "first come-first serve" basis subject to an annual numerical quota for the entire Western Hemisphere. Immigration and Nationality Act of October 3, 1965, Sec. 21(e), P.L. 89-236, 79 Stat. 921. Immigrants from Eastern Hemisphere countries are subject to separate annual numerical quotas from each country, which are allocated by statute among seven preference categories. A non-preference immigrant can obtain an *(continued)*

However, if their family relationship is included within the definitions of "parent" and "child" under the Immigration and Nationality Act, a United States citizen parent is entitled to have his alien child exempted from the numerical quota and labor certification requirements and a United States citizen or legal permanent resident child is entitled to have his Western Hemisphere alien parent exempted from the labor certification requirement. Immigration and Nationality Act (INA) §§101(b)(1) and (2), 201(b), 212(a)(14) (8 U.S.C. §§1101(b)(1) and (2), 1151(b), and 1182(a)(14)).

A United States citizen is allowed the entry of his "immediate relative" without regard to either any numerical quota or a labor certification. INA §§201(b), 212(a)(14) (8 U.S.C. §§1151(b), 1182(a)(14)) An immediate relative is defined as the child, parent or spouse of a United States citizen. INA §201(b) (8 U.S.C. §1151(b)) Without "immediate relative" status, the citizen's child, if from the Western Hemisphere, is subject to a general quota and, if from the Eastern Hemisphere, is considered a non-preference immigrant. A non-preference immigrant can enter this country only when there is an available quota number not used within the seven preference categories. INA

(footnote continued from preceding page)
immigrant visa only when there is an available quota number not used within one of the seven preference categories. INA §§202(a), 203 (8 U.S.C. §§1152(a), 1153) Immigrants from colonies of Eastern Hemisphere countries, even though located in the Western Hemisphere, are subject to annual numerical quotas from the colonies which are allocated on the preference system. In addition to meeting the numerical quota requirements, all such immigrants must obtain labor certifications. See footnote 2, *infra*.

§203(a)(8) (8 U.S.C. §1153(a)(8)) Thus, unless a United States citizen parent and alien child can attain the status of "parent" and "child" under the Act, they realistically are rendered unable to live together in this country.

A United States citizen or legal permanent resident "child" is given the statutory right to have his Western Hemisphere "parent" exempted from the labor certification requirement. Where required, a labor certification will be given only if the Secretary of Labor has certified to the Secretary of State that the specific job that the alien will perform in the United States is in short supply and that his employment will not adversely affect the wages and working conditions of United States workers. INA §212(a)(14) (8 U.S.C. §1182(a)(14)) A labor certification is not given at all for a great number of jobs and is extremely difficult to obtain even for those jobs for which the certification is available.[2] Thus, unless a United States citizen or

[2] A person seeking a labor certification must submit his job qualifications to an immigration or consular official. The Secretary of Labor has by regulation compiled a list of many jobs for which a labor certification will never be given. 29 C.F.R. §§60.2(2), 60.7, Schedule B. The Secretary of Labor has also established a list of jobs in certain occupations, such as those which require an advanced degree in a medically related field or involve certain religious professions, for which a labor certification may be granted if the alien establishes to the satisfaction of an immigration or consular official that he meets the particular qualifications. 29 C.F.R. §§60.2(2), 60.7, Schedule A. Persons qualified for work in any other job category for which a labor certification can be given must have a specific job offer from an employer in the United States. 29 C.F.R. §60.3(c). The Department of Labor must then gather the appropriate evidence and certify that the specific job that the alien will perform in the United States is in short supply and will not adversely affect the wages or working conditions of persons presently in the United States. INA §212(a)(14) (8 U.S.C. §1182(a)(14))

permanent resident child and his alien father are able to attain the status of "child" and "parent" under the Act, they realistically are rendered unable to live together in this country.

Included in the definition of "child" and "parent" are a legitimate child and either parent, whether married, divorced, or separated, a legitimated child and either parent, a stepchild and stepparent, an adopted child and his adoptive parent, an orphaned child and his adoptive or prospective adoptive parent, and an illegitimate child and his mother. Not included in the definition of "child" is an illegitimate child in relationship to his father. Not included in the definition of "parent" is the father of an illegitimate child.

Those United States citizen or legal permanent resident parents and children and their alien children or parents who claim to have a relationship covered by the statutory definition of parent and child are given the opportunity for an individualized determination of their family relationship before the Immigration and Naturalization Service and a United States Consul of the Department of State. In all cases, the citizen or resident and the alien relative must prove their relationship to the satisfaction of immigration and consular officials. INA §§204, 221(a) and (g), 224, 291 (8 U.S.C. §§1154, 1201(a) and (g), 1204, 1361) On the other hand, any United States citizen or permanent resident and alien relative who claim the relationship of illegitimate child in relation to his unwed father are denied any opportunity to prove their family relationship and thus to achieve the status without which they realistically are unable to live together in this country. Accordingly, a United States citizen father or a United States citizen or permanent resident child is precluded

by the restrictive definition of "parent" and "child" from living together in this country with his alien child or father.

B. Facts

The following factual allegations of the plaintiffs in this case were not disputed below by the Government and were substantially made findings of fact by the District Court. (A at 53)[3] The plaintiffs are a United States citizen father and his alien child, a United States citizen child and his alien father, and two United States legal permanent resident children and their alien father.

1. Cleophus Rupert Warner and Serge Patrick Warner

Cleophus Rupert Warner became a naturalized citizen of the United States in 1966. (A at 31, 36) His son, Serge Patrick Warner, was born on February 23, 1960 in the French West Indies. (A at 31, 36) Shortly after the birth of his son, Cleophus Warner registered as his father in the French West Indies and acknowledged paternity, and his name appears on Serge's birth certificate.[4] (A at 31, 36) Cleophus Warner has never

[3] References to the Appendix are denominated "A".

[4] A true and accurate copy of this birth certificate is attached as Exhibit D to plaintiffs' Statement pursuant to local District Court Rule 9(g), which was submitted in support of plaintiffs' motion filed in the District Court on August 8, 1975 for class action certification, summary judgment, and permanent injunction.

been married to Serge Patrick Warner's natural mother, Elenore Carmelie Gibs. (A at 31, 36) Both in the French West Indies and in the United States, Mr. Warner worked and supported and maintained his son from his birth until the present time, and he intends to continue to do so in the future. (A at 31, 37)

Serge Warner entered the United States as a visitor on August 22, 1969, solely for the purpose of visiting his father. (A at 31, 37) Shortly after his arrival in this country, his mother wrote to Mr. Warner from outside the United States to inform him that she had married, was moving to a new undisclosed address and did not want their son returned to her. (A at 31, 37) Thus, Serge Warner cannot be legitimated, since under applicable law legitimation can occur only by marriage of the parents.[5] (A at 31, 37)

Mr. Warner filed a Form I-130, "Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa" with the Immigration and Naturalization Service in New York City as the proper preliminary step for obtaining an immigrant visa and permanent resident status for an unmarried child under twenty-one of a United States citizen. (A at 32, 37) In a decision[6] dated March 4, 1972 the petition was rejected as mandatorily deniable under INA §101(b) (8 U.S.C. §1101(b)) because Serge Warner was not the legitimate or the legitimated issue of Cleophus Warner. (A at 32,

[5] *Matter of Julianus*, Board of Immigration Appeals (BIA) Interim Decision #2227 (September 14, 1973) (law of Guadaloupe, French West Indies); New York Domestic Relations Law §24 (McKinney Supp. 1975).

[6] Attached as Exhibit E to plaintiffs' Statement pursuant to Rule 9(g). See footnote 4, *supra*.

37, 48) Mr. Warner also attempted to obtain permanent resident status for his son Serge by writing to the United States Consul in the French West Indies. (A at 32, 37) In response, he was informed that he must obtain an approved I-130 Petition before the Consul could take any action. (A at 32, 37)

Although there is an exclusion proceeding presently pending against him, the Government has agreed, pending the outcome of this case, to permit Serge Warner to continue to reside with his father in Queens, New York. (A at 31, 37) There his father continues to support and maintain him. (A at 31, 37, 38) Both Cleophus and Serge Warner desire that Serge remain in the United States to live with his father. (A at 32, 37, 38) However, he is effectively precluded from doing so because without immediate relative status Serge must satisfy the restrictive numerical quota and labor certification requirements which he realistically cannot meet.

2. Ramon Martin Fiallo and Ramon Augusto Rafael Fiallo-Sone

Ramon Martin Fiallo is a five-year-old citizen of the United States born in New York, New York on January 2, 1971 (At at 28, 33, 35) His natural parents are Celia Francisca Michel Rodriguez and Ramon Fiallo-Sone. (A at 28, 33, 35) The father's name appears on his son's birth certificate.[7] (A at 28, 33) While his mother was

[7] A true and accurate copy of this birth certificate is attached as Exhibit A to plaintiffs' Rule 9(g) Statement. See footnote 4, *supra*. On the birth certificate, the mother's name appears incorrectly as Celia Fiallo.

working and supporting Ramon Jr., his father assumed, from the time of Ramon's birth, the role of primary caretaker of and constant companion to his son. (A at 28, 34, 35) Thus, Ramon Jr. is very dependent upon and attached to his father. (A at 28, 35) For personal reasons, Ramon Fiallo-Sone and Celia Francisca Michel Rodriguez have never married. (A at 28, 34, 35) Both of Ramon's parents want their son to be raised in the United States so that he can obtain the full benefits of his citizenship. (A at 34, 35) Ramon's mother feels that it is in her son's best interest to live with his father because Ramon is dependent on Mr. Fiallo. (A at 28, 35)

Ramon Fiallo-Sone is a citizen of the Dominican Republic. (A at 34) A "Preliminary Questionnaire to Determine Immigrant Status"[8] was submitted on his behalf to the United States Consulate in the Dominican Republic as the proper preliminary step in obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States citizen child under twenty-one. (A at 39, 34, 47) Consul Catherine M. Hurley rejected and returned the questionnaire together with a letter[9] stating that Ramon Fiallo-Sone was not eligible for an immigration visa and permanent resident status without a labor certification since his citizen son was not his legitimate issue. (A at 29, 34, 46) Under applicable law, Ramon Martin Fiallo cannot be legitimated other than by marriage of his parents, who have chosen not to marry.[10] Ramon

[8] Attached as Exhibit C to plaintiffs' Rule 9(g) Statement. See footnote 4, *supra.*

[9] Attached as Exhibit B to plaintiffs' Rule 9(g) Statement. See footnote 4, *supra.*

[10] *Matter of Doble-Pena*, 13 I&N Dec. 366 (BIA 1969) (law of the Dominican Republic); New York Domestic Relations Law §24 (McKinney Supp. 1975).

Martin Fiallo, a citizen of the United States, was thereby denied the statutory right of having his father deemed eligible on the basis of their father-son relationship for an immigration visa and permanent resident status, without having to obtain a labor certification. (A at 29, 34) In the past, Mr. Fiallo has sought and been unable to obtain a labor certification. (A at 28-29)[11]

3. Trevor Aston Wilson, Earl Antonio Wilson, and Arthur Cecil Wilson

Trevor and Earl Wilson, permanent residents of the United States, were born in Jamaica on June 19, 1957 and January 6, 1959, respectively, to Leonie (Leony) (Muckle) Moses and Arthur Cecil Wilson, who were never married. (A at 29, 39, 41, 42) Their father Arthur Wilson is a citizen of Jamaica. (A at 42) Trevor and Earl recognize Mr. Wilson as their father, and he recognizes them as his sons. (A at 27, 39, 41, 42) From the time of their births until 1968, when they were eleven and nine respectively, Trevor and Earl Wilson lived with and were supported by their father. (A at

[11] During the pendency of this case in the court below, the Government agreed to stay the deportation of Mr. Fiallo. Subsequent to the District Court's decision, the Immigration and Naturalization Service sent Mr. Fiallo a notification which ordered him to leave this country. After this notification was sent out, Mr. Fiallo's attorney obtained from the Service a further stay of the deportation. However, Mr. Fiallo left this country for the Dominican Republic, along with his son, upon receiving the notification ordering him to leave, before he knew that the deportation had been stayed again. Since his departure Mr. Fiallo has expressed to his attorneys his continuing desire to live together with his son in this country.

29-30, 39, 41, 42-43) Subsequent to 1968, when they entered the United States with their mother, they have maintained a relationship with their father by visits and letters, and Arthur Wilson has contributed to their support. (A at 30, 39, 41, 42-43)

Upon the death of their mother in 1974 in New York City, Trevor and Earl Wilson requested that their father come to the United States. (A at 30, 39-40, 41, 43) Because of the mother's death, Arthur Wilson obtained a temporary emergency visa and entered the United States. (A at 30, 40, 41, 43) Trevor and Earl wish to stay in the United States, continue their education and eventually become citizens, and they desire and need their father to live with and maintain them in the United States. (A at 30, 40, 42-43) As the older child, Trevor submitted a Form I-550 to the Immigration and Naturalization Service as the proper preliminary procedure for obtaining an immigrant visa and permanent resident status for a parent of a United States permanent resident unmarried child under twenty-one. (A at 31, 40) Trevor Wilson has received no response from the Immigration and Naturalization Service but, as found by the District Court (A at 54), his father will not be exempted from the labor certification requirement since the Immigration and Nationality Act does not recognize an illegitimate child and his father as "child" and "parent."

It is not possible for Mr. Wilson to meet the labor certification requirement since the sole job for which he is qualified – general handy man – is one for which a labor certification will never be furnished. See 29 C.F.R. §60.7 Schedule B. (A at 30-31) Under applicable law, Trevor and Earl Wilson cannot be

legitimated except by marriage of their parents,[12] which is impossible since the mother is dead. (A at 30, 43)

Arthur Wilson left the United States when the extensions he was able to obtain on his temporary visa expired. (A at 30, 40, 41) He returned to Jamaica because without permanent resident status he could not obtain a job in the United States and he felt that in Jamaica he could work and contribute to the support of his children. (A at 30, 40, 41) He also did not want to violate the law by overstaying the time period allowed on his temporary visa. (A at 30, 40, 41) Trevor and Earl Wilson desire that Arthur Wilson return to the United States as a permanent resident so that they can all live together as a family here.[13] (A at 30, 40, 42)

C. Proceedings Below

Plaintiffs instituted this class action on July 22, 1974 in the United States District Court for the Eastern District of New York, challenging the constitutionality of the provisions of the Immigration and Nationality Act which fail to recognize the family relationships of

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[12]"Any child born before the marriage of his or her parents whose parents have intermarried or shall hereafter intermarry shall be deemed on the marriage of such parents to have been legitimated as from the date of such marriage and shall be entitled to all the rights of a child born in wedlock." Laws of Jamaica (Revised Edition 1953) Chapter 217, Section 2 of Legitimation Law; New York Domestic Relations Law §24 (McKinney Supp. 1975).

[13]Subsequent to the submission of this case to the District Court, Trevor Wilson attained the minimal age necessary to apply for citizenship in this country and has made such an application.

United States citizen and permanent resident illegitimate children and fathers of illegitimate children and their alien fathers and children and thereby deny them concomitant statutory rights under the immigration law, solely on account of the gender of the parent and the illegitimate birth status of the child. A divided three-judge court, convened pursuant to 28 U.S.C. §§2282 and 2284, denied plaintiffs' motions for summary judgment and permanent injunction, granted judgment for defendants, and dismissed the action.[14] (A at 53, 74-75)

Plaintiffs' timely Notice of Appeal to this Court was filed on December 31, 1975. (A at 75-76) On June 7, 1976, this Court granted plaintiffs' motion for leave to proceed *in forma pauperis* (A at 78) and noted probable jurisdiction over the appeal. (A at 77)

SUMMARY OF ARGUMENT

By operation of the federal statutory provisions challenged in this case, United States citizen or permanent resident illegitimate children and fathers of

[14]In view of its disposition of the case, the District Court declined to pass on plaintiffs' motion for class action certification. (A at 60) Plaintiffs contend that this action is properly maintainable as a class action pursuant to Rule 23(a), and Rule 23(b)(2) or Rule 23(b)(1)(A) or (B), of the Federal Rules of Civil Procedure. The parties have already stipulated that the numerosity requirement of Rule 23(a) is met. (A at 45) If this Court reverses the judgment appealed from, plaintiffs respectfully request this Court to remand the case back to the District Court for, *inter alia*, determination of plaintiffs' motion for class action certification.

illegitimate children and their alien fathers and children are discriminatorily omitted from the statutory definitions of "child" and "parent" which enable United States citizens and legal permanent residents to remain or be reunited in this country with their alien parents or children. This discrimination is plainly unconstitutional under the First, Fifth, and Ninth Amendments to the United States Constitution because the challenged provisisions infringe fundamental constitutional interests of United States citizens and legal permanent residents, deny basic procedural rights solely on the grounds of the gender of the parent and the illegitimate birth status of the child, and do not further in a rational manner either the actual and exclusive purpose of Congress in enacting the challenged provisions or even the speculative interests advanced by the Government in this case.

The challenged statutory discrimination abridges fundamental constitutional interests of United States citizens and legal permanent residents in family association and mutual companionship in this country between fathers and their illegitimate children. The challenged provisions effectively force the *de facto* deportation from this country of the United States citizen or permanent resident illegitimate child or father of an illegitimate child who seeks to secure a life together with his alien father or child. As illustrated by the plaintiffs' cases, the operative effect of the challenged discrimination is therefore to put these United States citizens and permanent residents to the Hobson's choice of foregoing either their constitutionally protected familial and associational interests, on the one hand, or the equally basic privileges and immunities of their citizenship or residency, on the other.

The challenged provisions completely deny United States citizen or permanent resident illegitimate children and fathers of illegitimate children the opportunity, which is afforded to persons whose parent-child relationships are recognized by the statute, to prove the existence of a family relationship with their alien fathers and children. The challenged classifications grant the opportunity to establish the parent - child relationships consisting of a legitimate child and either parent whether married, divorced, or separated, a legitimated child and either parent, a stepchild and his stepparent, an adopted child and either adoptive parent, an orphaned child and an adoptive or prospective adoptive parent, and an illegitimate child and his mother, but fail to accord a similar opportunity to establish the parent-child relationship of an illegitimate child and his father. Thus, these provisions discriminatorily deny this basic procedural opportunity to the plaintiffs solely on account of the gender of the parent and the illegitimate birth status of the child. Such discrimination, grounded on the immutable characteristics of sex and illegitimacy, rests upon unwarranted stereotypes concerning the fathers of illegitimate children and their relationships with their children and has been condemned repeatedly by this Court.

When subjected to the close judicial scrutiny which is triggered by the abridgement of fundamental constitutional interests of United States citizens and legal permanent residents and by discrimination on grounds of sex and illegitimacy, the challenged provisions plainly cannot pass constitutional muster. However, the provisions are constitutionally deficient in any event, since they fail to rationally advance either the actual Congressional purpose or the conjectural interests in

morality and administrative convenience asserted by the Government.

The exclusive purpose of Congress in enacting the challenged statutes was the unqualifiedly benevolent one of enabling United States citizens and permanent residents to remain or be reunited in this country with their alien parents and children, whether the family relationship be legitimate or illegitimate. That exclusive Congressional purpose is not served, and indeed is frustrated, by the failure of the challenged provisions to recognize the family unit composed of the United States citizen or permanent resident illegitimate child or father and his alien father or illegitimate child, and by their resultant failure to enable that American family to be united in this country. The interests advanced by the Government in defense of these provisions can fare no better. The asserted interest in legislating morality is not only patently unsupportable as an actual concern of Congress but as well would not be rationally served by the particular character of the challenged discrimination. Certainly, fathers of illegitimate children are neither more nor less immoral than mothers of illegitimate children or than fathers of legitimated illegitimate children, and in no event are illegitimate children responsible for the conduct of their parents. Further, neither mothers nor fathers of illegitimate children are legally barred from this country, and indeed some parents of illegitimate children are included within the statutory definition challenged here. Equally, there is no evidence to indicate that Congress had as its objective the Government's asserted interest in facilitating administrative convenience by reducing the potential for spurious claims. Moreover, the purported interest in administrative convenience is

plainly not advanced in a rational manner by the challenged discrimination. The nature and problems of proof of parentage, and the attendant potential risks of spurious claims, are no different for claims of the parent-child relationship of father and illegitimate child than for claims of the parent-child relationships which are recognized by the challenged provisions. In addition, comprehensive administrative procedures and rigorous criminal fraud provisions already are applied to deal with problems of proof and risks of fraud which might inhere in claims of parentage generally. In light of this, the irrebutable presumption created by the challenged provisions that a United States citizen or permanent resident illegitimate child or father of an illegitimate child, and his alien father or child, never have a family relationship is plainly unwarranted and unconstitutional.

Finally, the challenged provisions are not saved from constitutional condemnation here merely because they involve legislation in the immigration field. This case is unique and fundamentally different from those immigration cases where this Court has sustained the exercise of Congressional or executive power. In sharp contrast to those cases, this case involves the constitutionality of an immigration statute designed to benefit United States citizens and legal permanent residents, concerns the infringement of fundamental constitutional interests of United States citizens and permanent residents, deals with essentially procedural due process rights of citizens and residents, challenges unwarranted discrimination on the dual bases of sex and illegitimacy, and involves statutory provisions having the exclusive benevolent purpose to secure the unity of American families and having no concern to promote foreign policy or exclude undesirable aliens perceived to threaten the national security or general welfare of this country.

ARGUMENT

POINT I

TO DENY UNITED STATES CITIZEN AND PERMANENT RESIDENT ILLEGITIMATE CHILDREN AND FATHERS OF ILLEGITIMATE CHILDREN AND THEIR ALIEN FATHERS AND CHILDREN THE STATUTORY STATUS OF PARENT AND CHILD WHICH ALONE WOULD ENABLE THEM TO REMAIN OR BE UNITED TOGETHER IN THIS COUNTRY IMPERMISSIBLY INFRINGES FUNDAMENTAL CONSTITUTIONAL INTERESTS OF UNITED STATES CITIZENS AND PERMANENT RESIDENTS AND DISCRIMINATORILY DENIES THEM THEIR BASIC PROCEDURAL DUE PROCESS OPPORTUNITY TO BE HEARD SOLELY ON THE GROUNDS OF SEX AND ILLEGITIMACY.

A. Fundamental Constitutional Interests Of United States Citizens And Legal Permanent Residents Are Abridged By The Challenged Provisions.

The inevitable effect of the restrictive statutory definition of "child" and "parent" contained in the challenged provisions is to deny United States citizen and permanent resident fathers and children their constitutionally protected interest in a familial relationship and association in this country with their children and fathers.[15] It is well settled by repeated decisions of

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[15] *Contrast Mathews v. Lucas*, ___ U.S. ___, 44 U.S.L.W. 5139, 5142 n. 8 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 771-72 (1975).

this Court that parents and their children have a fundamental constitutional interest in mutual companionship and a life together.[16] "The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and '[r]ights far more precious. . . than property rights,' *May v. Anderson,* 345 U.S. 528, 533 (1953)." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). *Also Levy v. Louisiana,* 391 U.S. 68, 71 (1968); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 169-70 (1972). This fundamental liberty and associational interest in the familial relationship extends equally to fathers as to mothers and equally to illegitimate as to legitimate relationships.

> It is no less important for a child to be cared for by its. . .parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised. . .' *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). *Weinberger v. Wiesenfeld,* 420 U.S. 636, 652 (1975).

See also Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 169 (1972); *Stanley v. Illinois,* 405 U.S. 645, 652 (1972); *Levy v. Louisiana,* 391 U.S. 68, 71-2 (1968). The State cannot replace the parent in his function of nurturing and rearing his own child.

> It is cardinal. . .that the custody, care, and nurture of the child reside first in the parents, whose

[16]These constitutionally fundamental interests have variously been found by this Court to be protected by the First, Fifth, or Ninth Amendments. *Roe v. Wade,* 410 U.S. 113 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

> primary function and freedom include the preparation for obligations the state can neither supply nor hinder. *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944).

These fundamental constitutional interests in family association are necessarily denied by operation of the challenged provision, unless the United States citizen or legal permanent resident is willing to acquiese in his *de facto* deportation from this country, with the attendant loss of important rights, in order to be united abroad with his father or child. Because a minor child is often unable to sustain himself without the care and companionship and the financial support of his father, especially where he is the sole caring parent, the statutory barrier to the unification of the parent and child in this country will often force the United States citizen or permanent resident child or citizen father to depart from this country. Thus, if the alien parent is not permitted to live in the United States, the citizen child may be effectively forced to leave his country to remain with the parent. Also, a United States citizen father may feel compelled to leave this country along with his child rather than send him off alone to another country where there is no one to care for him.

The effect on the United States citizen child or father of this *de facto* deportation is to abridge his fundamental interest in living in this country, a prime incident of his citizenship. *Cf. Shapiro v. Thompson,* 394 U.S. 618, 642 (1969) (concurring opinion); *United States v. Wheeler,* 254 U.S. 281, 293 (1920). The effect on the legal permanent resident child is to jeopardize his resident status and eligibility for future citizenship. *Cf. Hampton v. Mow Sun Wong,* ___ U.S. ___, 48 L.Ed. 2d 495 (1976). In order to maintain a legal

permanent resident status, an alien must have residency in this country, and to be eligible for citizenship a legal permanent resident must maintain that status for five years. Absences from this country, other than very temporary ones, indicate an abandonment of legal permanent resident status, *Matter of Kane,* BIA Interim Decision #2371 (April 1, 1975), and also can render the resident ineligible for citizenship. INA § 316(a) and (b) (8 U.S.C. § 1427(a) and (b)).

Accordingly, the operation of the challenged provisions forces the plaintiff United States citizens and permanent residents to choose between their constitutionally protected familial and associational interests, on the one hand, and the equally basic privileges and immunities of their citizenship or residency, on the other. Thus, Mr. Warner, the United States citizen father of Serge Warner, is put to an impossible choice. If he decides to remain in the country of his citizenship, he will have no alternative but to send the child he has always supported and exclusively cared for since 1969 to a country where there is no one to care for him. If, on the other hand, Mr. Warner decides to continue to live with his son, he has no choice but to leave the United States. Ramon Martin Fiallo, a five-year-old United States citizen, has already been forced to leave the country with his alien father, Mr. Fiallo, who is and has always been his primary caretaker and companion. Trevor and Earl Wilson, legal permanent residents of the United States, already have been denied a parent-child relationship with their only surviving parent, since their father had to leave this country due to the lack of statutory recognition of their family relationship.

B. The Challenged Provisions Discriminatorily Deny To United States Citizens And Permanent Residents Their Fundamental Procedural Due Process Opportunity To Establish Their Family Relationships With Their Alien Parents And Children, Solely On The Bases Of The Immutable Characteristics Of Sex And Illegitimacy

This Court has held that "[a]t its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971). " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean,* 234 U.S. 385, 394 (1914)." *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970). *Also Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950); *cf. Hampton v. Mow Sung Wong,* ___ U.S. ___, 48 L.Ed. 2d 495, 520 n.1 (1976) (dissenting opinion). By operation of the challenged provisions United States citizens and permanent residents and their alien fathers and children are completely denied any opportunity to establish the existence of their family relationship. *Contrast Mathews v. Lucas,* ___ U.S. ___, 44 U.S.L.W. 5139, 5142 n.8 (1976). Thus, the challenged provisions effectively create an unwarranted conclusive presumption that United States citizens or permanent residents and aliens who claim the relationship of illegitimate child and unwed father never have that relationship, even if they in fact do. *See Turner v. Department of Employment Security,* 423 U.S. 44 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Jimenez v. Weinberger,* 417 U.S. 628 (1974); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *United States Department of Agriculture v. Moreno,* 413 U.S.

528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The basic procedural due process opportunity to be heard, and thus the fundamental constitutional interests at stake for United States citizens and permanent residents, are abridged by the challenged provisions solely on account of the gender of the parent and the illegitimate birth status of the child. A child can be a "child" under the challenged provisions if he is a legitimate child, a legitimated child, a stepchild, an adopted child, an adopted or prospective adopted orphan child, or an illegitimate child in relation to his mother, but not if he is an illegitimate child in relation to his father. A father or mother can be a "parent" under the challenged provisions if he or she is a married, divorced, or separated parent of a legitimate child, a parent who fortuitiously lives in a country where he can accomplish legitimation of his child, a stepparent, an adoptive or prospective adoptive parent, or the mother of her illegitimate child, but not if the parent is the father of his illegitimate child.

The gender-based and illegitimacy discrimination which occurs here[17] in combination rests upon archaic and overbroad stereotypes concerning the character of unwed fathers and their relationship to their illegitimate

[17]The primary sex discrimination imposed by the challenged provisions is against illegitimate children and their fathers. However, the provisions discriminate against women as well. Under the challenged provisions the United States citizen or permanent resident father has the assurance that if he is unable to care for his illegitimate United States citizen or permanent resident child, that child can be united in this country with the other parent, the mother. However, because of the operation of the challenged classifications, the United States citizen or

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children. Cf. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972). Men, and especially out-of-wedlock fathers, traditionally have been stereotyped as having no interest in child rearing. Women, on the other hand, are stereotyped as the center of the home and family and as concerned exclusively with child raising. These stereotypes tend to foster each other and, as this Court has observed, suggest fixed roles which ignore individual circumstances. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion). Specifically, this Court has recognized that fathers, including out-of-wedlock fathers, may be the sole and primary caretakers of or otherwise have close relationships with their children. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 169 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The invalidity of stereotypes which depict the father of an illegitimate child as having little interest in and only a superficial relationship with his child and with the child's mother is confirmed by current social science literature and by the facts of the plaintiffs' cases.

Sociological literature and empirical studies demonstrate that in fact most out-of-wedlock pregnancies

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permanent resident mother has no similar assurance in the event that she is unable to take care of her illegitimate child, since the father is effectively barred from entering this country because he is not included within the statutory definition of "parent." Thus, Leony Moses, the legal permanent resident mother of Trevor and Earl Wilson, could not be assured that upon her death her children would be supported and cared for in this country by the remaining parent, the father, Arthur Wilson. *Cf. Weinberger v. Wiesenfeld*, 420 U.S.636, 645 (1975).

result from exclusive long-term relationships between the mothers and fathers,[18] which are similar to the relationships of married or courting couples in the general population.[19] The father of the child often

[18]C. Bowerman, D. Irish, H. Pope, *Unwed Motherhood: Personal And Social Consequences* 97. Partial Report of Projects #006 and #189, Social Security Administration, Division of Research and Statistics, Institute for Research in Social Science, University of North Carolina, Chapel Hill, (1966), Unpublished (cited hereinafter as *Bowerman, Irish & Pope*), partially reported in Pope, "Unwed Mothers and Their Sex Partners," 29 *Journal of Marriage and The Family* 555, 558 (August, 1967), (cited hereinafter as *Pope*); Chaskel, "Unmarried Mother: Is She Different?" 46 *Child Welfare* 65, 72 (1967), (cited hereinafter as *Chaskel*); Herzog, "Some Notes About Unmarried Fathers," 45 *Child Welfare* 194 (April, 1966) (cited hereinafter as *Herzog*); Knight, "Conference for Pregnant Unwed Teenagers," 65 *Journal of Nursing* 126 (July, 1965), (cited hereinafter as *Knight*); *New York Times*, July 29, 1969, at 58, col. 1; M. Sauber and E. Rubinstein, *Experiences Of The Unwed Mother As A Parent* 27, Community Council of Greater New York (1965), (cited hereinafter as *Sauber and Rubinstein*), partially reported in Sauber, "The Role Of The Unmarried Father," 4 *Welfare in Review* 15, 16 (Nov. 1966), (cited hereinafter as *Sauber*).

[19]Unwed mothers and fathers generally have a similar education and socioeconomic status. *Bowerman, Irish, and Pope, supra* note 18, at 117, 120; *Herzog, supra* note 18, at 194; R. Pannor, F. Massarik, B. Evans, *The Unmarried Father* 35 (1971), (cited hereinafter as *Pannor Massarik, and Evans*); *Pope, supra* note 18, at 560; Vincent, "Unmarried Fathers," in *Marriage and the Family in the Modern World* 294, 297 (R. Cavan ed., 1969), (cited hereinafter as *Vincent*); Wessel, "A Physician Looks At Services For Unmarried Parents," 49 *Social Casework* 11, 12 (1968), (cited hereinafter as *Wessel*). Age differentials between unwed mothers and fathers approximate husband and wife age differentials in the general population. *Bowerman, Irish and Pope, supra* note 18, at 108, 120; P. Ewer, Final Report, HSMHA, Maternal and Child Health Service, Project H-214-2,

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wishes to marry but the mother refuses.[20] Many fathers live with their illegitimate children.[21] Even fathers not

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Characteristics of AAPP Unwed Fathers – A Descriptive Study 13 (1971), (cited hereinafter as *Ewer*), (unpublished, obtained from Division of Research, Maternal and Child Health Service, HSMHA, 5600 Fishers Lane, Room 12A-11, Rockville, Md. 20852); *Pannor, Massarick, and Evans, supra* at 35; *Pope, supra* note 18, at 560; *Vincent, supra* at 297. The unwed fathers generally live in the same locality as the mothers and have mutual associates with the mothers *(Bowerman, Irish and Pope, supra* note 18, at 94; *Ewer, supra* at 13; *Pope, supra* note 18, at 557), and are well acquainted with the mothers' families. *Bowerman, Irish and Pope, supra* note 18, at 94; *Pope, supra* note 18, at 557. Most unwed couples meet through friends or relatives or at school or work. *Sauber and Rubinstein, supra* note 18, at 26; *Sauber, supra* note 18, at 16. Unwed parents constitute a cross section of the population and represent all socioeconomic classes. *Chaskel, supra* note 18, at 65.

Finally, premarital sex in this society is not confined to unwed parents, but rather is prevalent in the general population. See Hunt, *Sexual Behavior In The 1970's* (1974) (reporting that 97% of males and 2/3's of females had premarital sex by age 25); Kinsey, Pomeroy, Martin and Gebhard, *Sexual Behavior In The Human Female* 286 (1953); Kinsey, Pomeroy, and Martin, *Sexual Behavior In The Human Male* 249 (1948); Vener and Stewart, "Adolescent Sexual Behavior In Middle America Revisted: 1970-1973," 36 *Journal of Marriage and the Family* 728 (1974).

[20]*Bowerman, Irish and Pope, supra* note 18, at 131, 140; *Herzog, supra* note 18, at 194; *Knight, supra* note 18, at 126.

[21]*Sauber and Rubinstein, supra* note 18, at 53; *Sauber, supra* note 18, at 16. 1970 Census figures disclose that 99,364 children under eighteen were living in families or subfamilies headed by their single male parent. U.S. Bureau of the Census, 1 *U.S. Census of the Population 1970, Characteristics of the Population*, Pt. 1, U.S. Summary - Sec. 2, Table 206 (1973). A single male parent is defined as one who has never been married and is not

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living with their illegitimate children demonstrate genuine interest in and concern for them,[22] and assume the sociological functions of fatherhood, including the provision of financial and emotional support.[23] Children form equally strong bonds with their fathers as with their mothers,[24] and paternal deprivation has a profound psychological effect on the child's self-concept, academic achievement, intellectual development, and moral development.[25]

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widowed, divorced, or separated. U.S. Bur. of the Census, 1 *U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary* Sec. 2, Appendix B at 22 (1973). A child under eighteen is designated as "own child under eighteen" and is defined as a son or daughter by blood or adoption who has never married. Thus, wards, foster or other blood relations, e.g., nieces, are not included. *Id.*, Appendix B at 25. Single parent adoptions are rare and therefore do not significantly affect census figures. See Kaduskin, "Single Parent Adoption: An Overview," 44 *Social Services Review* 263 (1970), (reporting two adoptions by single fathers in that year).

[22]Chaskel, "Changing Patterns In Services For Unmarried Parents," 49 *Social Casework* 3, 10 (1968); *Knight, supra* note 18, at 126.

[23]*Ewer, supra* note 19, at 2 and Table 33 (finding that between 59% and 83% of fathers of illegitimate children contributed money for their children's expenses and between 69% and 74% of fathers not living with their illegitimate children visited them).

[24]Kotelchuck, Zelazo, Kagan, and Spelke, "Infant Reaction To Parental Separations When Left With Familiar And Unfamiliar Adults," 126 *The Journal of Genetic Psychology* 255 (June, 1975); Ross, Kagan, and Zelazo, "Separation Protest In Infants In Home And Laboratory," 11 *Developmental Psychology* 256 (1975); Spelke, Zelazo, Kagan and Kotelchuck, "Father Interaction And Separation Protest," 9 *Developmental Psychology* 83 (1973).

[25]H. Biller, *Paternal Deprivation* (1974); D. Lynn, *The Father: His Role In Child Development* (1974).

The stereotypes concerning illegitimate fathers and their relationships with their children have absolutely no validity in their application to the facts of this case. All the plaintiff fathers publicly acknowledged the paternity of their children soon after their births, and their parentage was recognized by their children and by the mothers of the children. Each of the plaintiff fathers has lived with his child for a substantial period of the child's life and when unable to live with the child has supported and frequently visited him. Each of the plaintiff children has established a close and dependent relationship with his father.

Consistent with the increasing recognition that the indiscriminate stereotyping of persons because of their sex or illegitimate birth status is wholly unfounded and unwarranted, this Court has repeatedly condemned discrimination grounded on the mere status of gender[26] or illegitimacy.[27]

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[26]*Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Taylor v. Louisiana,* 419 U.S. 522 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71 (1971).

[27]*Jimenez v. Weinberger,* 417 U.S. 628 (1974); *Beaty v. Weinberger,* 478 F.2d 300 (5th Cir., 1973), *aff'd.* 418 U.S. 901 (1974); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973); *Gomez v. Perez,* 409 U.S. 535 (1973); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164 (1972); *Davis v. Richardson,* 342 F. Supp. 588 (D. Conn., 1972), *aff'd.* 409 U.S. 1069 (1972); *Griffin v. Richardson,* 346 F. Supp. 1126 (D. Md., 1972), *aff'd.* 409 U.S. 1069 (1972); *Glona v. American Guaranty and Liability Insurance Co.,* 391 U.S. 73 (1968); *Levy v. Louisiana,* 391 U.S. 68 (1968).

C. Since The Challenged Provisions Abridge Constitutionally Fundamental Interests Of United States Citizens And Legal Permanent Residents And Discriminate Solely On Grounds Of Sex And Illegitimacy, This Court Should Subject The Classifications To Close Judicial Scrutiny.

This Court has long made it clear that statutes which burden constitutionally fundamental liberty and associational interests must be subjected to exacting judicial scrutiny. *See Massachusetts Board of Retirement v. Murgia,* ___ U.S. ___, 44 U.S.L.W 5077, 5079 (1976); *Roe v. Wade,* 410 U.S. 113, 152-56 and cases cited therein (1973). Equally, this Court has imposed a heavy burden of constitutional justification on statutes which discriminate solely and finally on the bases of the immutable characteristics of gender and illegitimacy that rest on archaic and overbroad stereotypes. See cases at notes 26 and 27 of this brief, *supra.*

The provisions challenged here operate through an unwarranted conclusive presumption to deny United States citizen and permanent resident illegitimate children and fathers of illegitimate children any opportunity to establish their family relationships with their alien fathers or children, and thereby deny them their constitutionally fundamental interests in familial association and companionship, solely because of the gender of the parent and the illegitimate status of the child. When the challenged provisions are subjected to the close judicial scrutiny which is thus required, it is clear that the procedural ban imposed on the plaintiff United States citizens and permanent residents and their plaintiff alien fathers and children sweeps far too broadly to pass constitutional muster under equal

protection and due process principles of the Fifth Amendment's Due Process Clause. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Stanley v. Illinois,* 405 U.S. 645 (1972). Moreover, as demonstrated in POINTS II and III, *infra,* the challenged provisions are patently unconstitutional whatever be the applicable standard of constitutional review, since they fail to further in a rational manner either the actual Congressional purpose of the provisions or the conjectural interests asserted by the Government.

POINT II

THE CHALLENGED PROVISIONS DO NOT RATIONALLY FURTHER THE ACTUAL AND EXCLUSIVE PURPOSE OF CONGRESS TO ENABLE UNITED STATES CITIZENS AND LEGAL PERMANENT RESIDENTS TO REMAIN OR BE REUNITED IN THE UNITED STATES WITH THEIR ALIEN PARENTS OR CHILDREN, WHETHER THE FAMILY RELATIONSHIP BE LEGITIMATE OR ILLEGITIMATE.

This court has repeatedly held that the constitutionality of federal statutes must be determined in light of the actual purpose of Congress as disclosed by an examination of the legislative history and the statutory scheme. *Mathews v. Lucas,* ___ U.S. ___, 44 U.S.L.W. 5139, 5143 n.14 (1976); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Jimenez v. Weinberger,* 417 U.S. 628 (1974). An examination of the relevant legislative history leaves no doubt that the actual and exclusive purpose of Congress in enacting the challenged statutory provisions

was the benevolent and ameliorative objective of enabling United States citizens or legal permanent residents to remain or be reunited in this country with their alien parents or children, whether their relationship be legitimate or illegitimate. *Cf. Immigration Service v. Errico,* 385 U.S. 214, 219-220 and n. 9 (1966). Upon analysis, it is clear that the challenged provisions are patently violative of equal protection principles of the Fifth Amendment's Due Process Clause because they bear no rational relationship to this exclusive Congressional purpose.

The Immigration and Nationality Act of 1952, Act of June 27, 1952, P.L. 82-414, 66 Stat. 163, revised and codified all immigration laws into one comprehensive statute. House Report No. 1365, 82nd Cong., 2d Sess. (1952). The 1952 Act defined "parent" and "child" and thus the status which enables United States citizens or legal permanent residents to remain or be reunited in this country with their alien children or parents. 66 Stat. 171. The House Report explained that the statute "implements the underlying intention of our immigration laws regarding the preservation of the family unit." House Report No. 1365, 82d Cong., 2d Sess., p. 29 (1952).

The 1957 modification of the definition of "child" and "parent" to include stepchildren born out-of-wedlock and their parents, and illegitimate children in relation to their mothers and those mothers (71 Stat. 639) was explained in the legislative history as furthering the "clearly expressed legislative intention to keep together the family unit whenever possible." House Report No. 1199, 85th Cong. 1st Sess., p. 8 (1957). Further, the House Report stated:

> The legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united. House Report No. 1199, 85th Cong. 1st Sess., p. 7 (1957).

The legislative purpose to maintain or to reunite the family unit was repeatedly stressed in the Congressional debate on the 1957 Act in both Houses:

> This bill is praiseworthy in its fundamental purpose – to reunite families. Senator Pastore, Co-sponsor, 103 Cong. Rec. 15497 (1957)

> My heart is glad for the thousands of American citizens who will now be able to be reunited with their families from whom they have been separated because of the working of our immigration law. Senator J.F. Kennedy, Co-sponsor, 103 Cong. Rec. 16719 (1957)

> We find, then, that the fundamental principle behind the most important provisions of this bill is the reunification of families, a principle to which all must subscribe. In this bill we move forward to remove the personal tragedy of split and separated families. This is a family bill – a bill for the family – the American family.
> Congressman Rodino, House Judiciary Committee, 103 Cong. Rec. 16307 (1957).

> RODINO: Is it not a fact that the fundamental principle behind the provisions and the most important provision of this bill is the reunification of families?
>
> CELLER: This is correct.
> Colloquy between Congressman Celler, Chairman of the Judiciary Committee and Congressman Rodino, member of the Committee, 103 Cong. Rec. 16301 (1957).

The 1957 legislative history clearly demonstrates that Congress was concerned with preserving "illegitimate" as well as "legitimate" family relationships:

> [I]t is believed that there is a need for the enactment of the instant section, in order to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock. . .
> House Report No. 1199, 85th Cong. 1st Sess., p. 7 (1957).

> Sympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent. . .
> House Report No. 1199, 85th Cong. 1st Sess., p. 8 (1957).

Thus the legislative history of the provisions defining "child" and "parent" clearly discloses that the sole Congressional purpose was to enable United States citizens and permanent residents to remain or be reunited with their alien parents or children in the United States, without regard to the legitimacy of the family relationship.

The challenged provisions recognize the parent-child relationships of a legitimate child and either parent whether married, divorced or separated, a legitimated child and either parent, a stepchild and his stepparent, an adopted child and either adoptive parent, an orphaned child and an adoptive or prospective adoptive parent, and an illegitimate child and his mother, but fail to recognize the parent-child relationship of an illegitimate child and his father. Failing to accord the status of "parent" and "child" to family units composed of illegitimate children and their fathers while granting that status to other family units also

composed of parents and children, solely on the basis of the gender of the parent and the illegitimate birth status of the child, does not rationally foster the purpose of Congress to maintain or reunite in this country family units containing United States citizen or permanent resident members. Indeed, the restrictive definition of "parent" and "child" actually perpetuates the very hardships attendant upon parent-child separation which the statutes were intended to alleviate, since denial of the status effectively precludes the United States citizens or permanent residents and their fathers or children from a life together in this country. The resultant hardships are dramatically illustrated by the circumstances of the plaintiffs herein, whose strong family ties are threatened with permanent disruption because of the discriminatory definition of "parent" and "child" in the challenged provisions. Thus, because the statutory definition arbitrarily fails to recognize their parent-child relationship, five-year-old United States citizen Ramon Martin Fiallo is unable to be united in this country with his alien father, his primary caretaker and constant companion since his birth. United States citizen Cleophus Warner is prevented from living together in this country with his alien son for whom he is the sole caring parent. Legal permanent residents Trevor and Earl Wilson are rendered unable to maintain a relationship in this country with their alien father, their sole surviving parent.

The utter irrationality of the challenged classifications is illustrated by the stepparent provision. INA §101(b)(1)(B) and (2) (8 U.S.C. §1101(b)(1)(B) and (2)) A father is never considered the "parent" of his illegitimate child. But if the parent marries, under the stepparent provision, his wife may be his illegitimate

child's "parent" and if his wife has an illegitimate child, he may be her child's "parent". It is wholly arbitrary for the challenged provisions to give recognition to the stepparent-stepchild relationship but not to the parent-child relationship between a father and his illegitimate child.[28] It is equally irrational, in light of the exclusive Congressional purpose to unite family units, to flatly deny recognition to all father-illegitimate child relationships while extending recognition automatically to all relationships between a legitimate child and his divorced or separated parent, an orphaned child and his adoptive or prospective adoptive parent, a legitimated child and his parent, and an illegitimate child and his mother.

Accordingly, the conclusion is inescapable that the challenged provisions violate equal protection principles of the Fifth Amendment's Due Process Clause, since the classifications created by the definition of "parent" and "child" discriminate against the plaintiffs solely on the bases of the gender of the parent and the illegitimate

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[28]The recognition of a stepparent, but not a natural father, as a parent contravenes the general conceptions of the obligations and rights of parenthood expressed by state laws. Thus, in every state in this country, fathers must support their illegitimate children. See, for example, Cal. Civ. Code §196a; Ga. Code Ann. §74-202 (1973); Kan. Stat. Ann. §§38-1101 to 38-1109 (1973); Mass. Gen. Laws Ann. ch. 273, §§11-19 (1970); Mich. Comp. Laws §722.712 (1968); New York Domestic Relations Law §33 (McKinney 1964); N.D. Rev. Code ch. 14-17 (1971); S.C. Code §20-303 (1962); Va. Code Ann. §20-61.1 (1973); Wyo. Stat. Ann. §§14-59-96 (1965). On the other hand, thirty-seven states impose no support obligation on a stepparent. Three states impose a support obligation on the stepparent only when the stepchild is destitute. Haw. Rev. Stat. §577-4; N.H. Rev. Stat. Ann. ch. 546A-2; Ore. Rev. Stat. §109.055.

birth status of the child and bear no rational relationship to the exclusive purpose of Congress to make possible the unification in this country of family units, whether legitimate or illegitimate, which contain United States citizen or permanent resident members. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

POINT III

THE INTERESTS ASSERTED BY THE GOVERNMENT IN THIS CASE WERE NOT ACTUAL PURPOSES OF CONGRESS AND IN ANY EVENT ARE NOT RATIONALLY FURTHERED BY THE CHALLENGED CLASSIFICATIONS.

As justification for the invidious discrimination and the infringement of constitutionally protected interests worked by the challenged provisions, the Government has advanced and the majority below relied upon interests which clearly find no support in the legislative history as actual concerns of Congress. Although these interests are therefore not legitimate governmental interests in light of which the constitutionality of the challenged provisions can be judged,[29] they could not in any event support the rationality of the challenged classifications.

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[29]See this brief at p. 31, *supra*.

A. The Asserted Governmental Interest In Legislating Morality Was Not a Purpose Of Congress And In Any Event Is Not Rationally Advanced By The Challenged Classifications.

The legislative history is barren of any indication that the challenged provisions were inspired by a Congressional moral aversion to any group of unwed parents and their illegitimate offspring. Rather, as demonstrated above and as found by the Court below,[30] Congress was motivated by a benevolent and generous desire to confer a benefit on United States citizens and permanent residents who seek to be united in this country with their parents or children, whether the relationship be legitimate or illegitimate. See this brief at p. 31 *et seq., supra.* A legislative purpose to ban "immoral" illegitimate children and their fathers from this country is belied by the statutory scheme itself. Not only are illegitimate children and their parents not generally barred from this country under the immigration law (see INA §212 (8 U.S.C. §1182)), but, further, most of them are already included in the very statutory definition which is challenged here.[31] Illegitimate children and their mothers, for example, are

[30] A at 59 (majority), 67 (dissent).

[31] Although it is theoretically possible under the law for alien illegitimate children and fathers of illegitimate children to be admitted to this country, as a practical matter their non-inclusion in the statutory parent-child definition precludes them from entering this country, because of the extreme difficulty of satisfying the restrictive numerical quota and labor certification requirements from which a "parent" and "child" are exempted. See this brief at pp. 4-6, *supra.*

included within the definition of "parent" and "child" and their unification in this country is thus realistically made possible. Not even all illegitimate children and their fathers are denied the statutory right, since it is granted, for example, to illegitimate children and their fathers who come from countries or live in states which allow subsequent legitimation by means other than marriage to the mother of the child. See this brief at pp. 46-47, *infra.*

Further evidence that Congress could not have been concerned with "morality" here is that children of adulterous relationships meet the definition of child under the statute. For example, the child of a married man and his concubine is recognized as his legitimate child under the challenged provisions. *Matter of Kwan*, 13 I&N Dec. 302 (BIA 1969). Also, a child is considered the stepchild of a woman under the challenged provisions notwithstanding that he is born as a result of an illicit relationship between her husband and another woman during the marriage. *Matter of Stultz*, BIA Interim Decision #2401 (1975).

Moreover, the challenged classifications would not rationally further any such moral considerations. A father of an illegitimate child is neither more nor less immoral than the mother of an illegitimate child, or than the father of an illegitimate child who fortuitously lived in a foreign country or a state in this country where legitimation is allowed by means other than marriage,[32] or than a man whose adultery results in the birth of a child. Finally, it is wholly impermissible and irrational to punish the innocent United States citizen

[32] See this brief, at pp. 46-47, *infra.*

and permanent resident children for assertedly "immoral" conduct of their fathers over which they had no control. *Levy v. Louisiana*, 391 U.S. 68 (1968); *cf. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

B. The Interest Asserted By The Government In Avoiding Administrative Inconvenience Attendant Upon Identifying Spurious Claims Of Paternity Was Not A Purpose Of Congress And In Any Event Is Not Rationally Advanced By The Challenged Discrimination.

1. Introduction

The legislative history is devoid of any indication that in denying a father any opportunity to prove the parentage of his illegitimate child Congress was concerned with administrative inconvenience involved in identifying spurious claims of paternity. Indeed, Congress has specifically chosen to deal with any problems of fraud through other statutory provisions, which punish and deter fraudulent conduct through the creation and imposition of criminal penalties and the sanction of excludability.[33] *Cf. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973). Further, comprehensive and elaborate adminis-

[33]INA §275 (8 U.S.C. §1325) makes it a crime to obtain "entry into the United States by a wilfully false or misleading representation or the wilful concealment of a material fact. . . ." 18 U.S.C. §1546 makes it a crime to impersonate another when applying for a visa or other document required for entry into the United States, evade or attempt to evade the immigration laws *(continued)*

trative procedures and practices established pursuant to Congressional authorization are regularly employed by the Immigration Service and United States Consuls in passing on claims of the existence of a parent-child relationship and in dealing with any attendant problems of proof. Finally, the parentage issue and the specific proof submitted in support of a parentage claim are often identical for persons who claim the father-illegitimate child family relationship and for persons who claim family relationships included within the challenged statutory definition. In light of these considerations, it is clear that the interest asserted by the Government in serving administrative convenience by reducing the purported potential for spurious paternity claims was not an actual purpose of Congress and that, in any event, the challenged classifications do not further such an interest in a rational manner.

(footnote continued from preceding page)
by appearing under an assumed or fictitious name, "knowingly" make "under oath a false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations" or "knowingly" present "any such application, affidavit or other document containing any such false statement." See also the criminal provisions of 18 U.S.C. §1001, regarding the making of a false or fraudulent statement in any matter within the jurisdiction of a United States department or agency, and of 18 U.S.C. §371, dealing with a conspiracy to defraud the United States or any of its agencies. Finally, in addition to being subjected to criminal penalties, any alien who seeks to procure, has sought to procure or has procured a visa or other documentation or seeks to enter the United States by fraud or by wilfully misrepresenting a material fact, is totally excludable from the United States. INA §212(a)(19) (8 U.S.C. §1182(a)(19)).

2. Administrative Procedures and Practices

The application of any United States citizen or legal permanent resident for entry of his alien parent or child as an immigrant into the United States is processed through a series of rigorous procedures established pursuant to Congressional authorization and administered by officials of the Immigration and Naturalization Service and by United States Consuls.[34] A full understanding of these procedures is crucial to recognizing that *all* claims of parentage, including those that would be made by the plaintiffs herein, are subjected to careful and exacting administrative scrutiny.

Satisfactory proof of the parent-child relationship generally must be made separately to two different immigration officials and a consular official.[35] All applications are made under oath,[36] and the burden of establishing the parent-child relationship rests on the citizen or resident and his alien relative.[37] Immigration and consular officials have great latitude in determining the character and quantum of proof required in order for the citizen and alien relative to satisfy their burden of proof in each individual case. Thus, these officials may require birth certificates, marriage certificates, baptismal certificates, school records, census records,

[34]INA §§103, 104 (8 U.S.C. §§1103, 1104).

[35]INA §§204, 221(a), 235(a) (8 U.S.C. §§1154, 1201(a), 1225(a)); 8 C.F.R. §§204.1(a), 235.1(a); 22 C.F.R. §42.21.

[36]INA §§204(a), 222(e) (8 U.S.C. §§1154(a), 1202(e)); 22 C.F.R. §42.117(b).

[37]INA §§224, 291 (8 U.S.C. §§1204, 1361); 22 C.F.R. §42.21.

affidavits, letters, photographs, remittances, proof of custody, proof of support, blood tests at the expense of the citizen or resident and his alien relative, and any other evidence they deem necessary.[38] Failure to comply with a request for evidence by an official – for example, the refusal to produce the results of a blood test – can result in denial of the application.[39] In determining a claim of parentage, the immigration official may conduct any necessary investigation, take testimony, and obtain the issuance of subpoenas for the attendance of witnesses or the production of documents.[40] In addition to any investigation done by an immigration official, a consular official also conducts an extensive and comprehensive background investigation of the alien relative.[41] The consular official cannot approve any application without a personal appearance and interrogation under oath,[42] and he has authority to require that the alien answer any question which is deemed material in his discretion.[43] The consular

[38]INA §§204(a), 222(b) (8 U.S.C. §§1154(a), 1202(b)); 8 C.F.R. §204.2; 22 C.F.R. §42.111; Instructions to INA Form I-130, given the force of regulation by 8 C.F.R. §103.2(a).

[39]8 C.F.R. §204.2(c)(8).

[40]INA §235(a) (8 U.S.C. §1225(a)); 8 C.F.R. §§103.2(b), 287.4.

[41]INA §§221(b), 222(a) (8 U.S.C. §§1201(b), 1202(a)); 22 C.F.R. §42.111; Part IV, Appendix E, 9 Foreign Affairs Manual – Visas (Publication of U.S. Department of State available in Immigration and Naturalization Service Public Reading Rooms).

[42]INA §222(e) (8 U.S.C. §1202(e)); 22 C.F.R. §42.114, 42.117.

[43]22 C.F.R. §42.117(c).

official as well has broad discretion in passing on the claim and may refuse to issue a visa if he has "reason to believe" that an alien is ineligible for a visa.[44]

In addition to proving his family relationship to the citizen or permanent resident, any claimed alien relative of a United States citizen or resident, like any other alien seeking entry, must also prove his general eligibility to enter the United States.[45] The sustaining of that burden of proof involves the submission of extensive biographical data bearing on family background, of employment and residence history, and of police and military service records, and requires submission to a medical examination.[46] For example, one of the requirements for entry of an alien into the United States is satisfactory proof that he is not "likely to become a public charge."[47] The citizen parent therefore must prove by affidavit, bank statement, employment record, tax record, and other appropriate evidence that he can support himself and his alien child in this country. An alien parent must similarly prove that he is able to support himself and his citizen or permanent resident child and that he has sufficient resources to sustain himself and his child while he seeks employment.[48] Finally, consular and immigration officials have the authority to subsequently revoke any approval of entry which they have given.[49]

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[44]INA §221(g) (8 U.S.C. §1201(g)).

[45]INA §§212(a), 291 (8 U.S.C. §§1182(a), 1361); 22 C.F.R. §42.91(a)

[46]INA §§221(b) and (d), 222 (8 U.S.C. §§1201(b) and (d), 1202).

[47]INA §212(a)(15) (8 U.S.C. §1182(a)(15)).

[48]22 C.F.R. §42.91 (40 Fed. Reg., No. 179, September 15, 1975, pp. 42532-33); Part III, 9 Foreign Affairs Manual – Visas, 22 C.F.R. §42.91(a)(15) – Notes; Department of State Form DSL-845.

[49]INA §§205, 221(i) (8 U.S.C. §§1155, 1201(i)).

3. Proof of Family Relationships

The elaborate and exacting administrative procedures detailed above are applied to all claims of family relationships included within the statutory definition of parent and child. The problems of proof and the potential for spurious claims are no different for the claims of family relationships recognized by the provisions than they would be for the claims of the family relationship of father and illegitimate child, because the proof adduced in support of the different claims is often identical. Thus, the United States citizen stepmother who petitions for entry into this country of the illegitimate child of her husband as a stepchild under the challenged provisions must necessarily prove paternity of the child by her husband. That issue of paternity, and the proof adduced in support of the paternity claim, are identical to the paternity issue and the supporting proof that would be involved in the husband's petition for entry into this country of the child as his illegitimate child. Specifically, if United States citizen Cleophus Warner were married to a United States citizen who petitioned for the entry into this country of his illegitimate son Serge Warner as her stepchild, she would have to establish to the satisfaction of immigration and consular authorities that Serge is in fact Mr. Warner's child, and on the exact same evidence that Mr. Warner would submit to establish his relationship as father of his illegitimate son.

It is equally true that the proof submitted to establish the existence of the statutorily recognized family relationship of parent and legitimate or legitimated child is often the same as the proof that would be offered to establish the family relationship of father

and illegitimate child. Although proof of legitimacy or legitimation brings with it statutory recognition of the parent-child relationship, the laws of various countries and even of states of this country are extremely diverse with respect to criteria for establishing legitimacy or legitimation. In some countries and in some states in this country no distinction is made between legitimate and illegitimate children – all children are simply legitimate.[50] In some countries children of adulterous relationships are legitimate.[51] Legitimation requirements are also diverse. Legitimation can occur through public acknowledgment and treatment of the child as his own by the father,[52] maintenance of the child by the father,[53] payment of medical bills associated with the child's birth,[54] a written declaration of paternity by the

[50]E.g., *Matter of G---*, 9 I&N Dec. 518 (BIA 1961) (law of Hungary); *Matter of Sinclair*, 13 I&N Dec. 613 (BIA 1970) (law of Panama); Ariz. Rev. Stat. Ann. §8-601; Ore. Rev. Stat. §109.060 (1975).

[51]E.g., *Matter of Kwan*, 13 I&N Dec. 302 (BIA 1969) (law of China, Hong Kong law).

[52]E.g., Cal. Civ. Code §7004(4) (Supp. 1975) (Uniform Parentage Act); Idaho Code §16-1510 (1948); Mont. Rev. Codes §61-301 to §61-327 (Supp. 1975) (Uniform Parentage Act); Oka. Stat. Ann. tit. 10, §55 (1966); S.D. Compiled Laws tit. 25, §6-1 (1967); Utah Code Ann. tit. 78, §30-12 (1953); Wash. Rev. Code Ann. §11.04.081 (1967).

[53]E.g., *Matter of Kwan*, 13 I&N Dec. 302 (BIA 1969) (law of China, Civil Code).

[54]E.g., Colo. Rev. Stat. Ann. tit. 19, §1-103(21) (1973).

father,[55] or a report or acknowledgment by the father of the child's birth as evidenced simply by the appearance of the father's name on the child's birth certificate.[56] Other jurisdictions require a judicial proceeding[57] or an executive decree[58] for legitimation of the child. In some jurisdictions only the marriage of the parents can legitimate a child.[59] Elsewhere, the child can never be legitimated.[60] The result of this diversity in the definition of legitimacy or legitimation is that the proof required to establish the family relationship of parent to legitimate or legitimated child is often no different from the proof which would be offered to establish the family relationship of father to his illegitimate child. Thus, if the alien child Serge

[55]E.g., Ala. Code tit. 27, §11 (1958); Alaska Stat. §25.20.050 (1962); Del. Code Ann. tit. 13, §1301 (1974); Ga. Code Ann. §74-103 (1973); Hawaii Rev. Stat. §338-21 (Supp. 1975); Mich. Comp. Laws §702.83 (1973); N.M. Laws ch. 257, §2-109 (1975).

[56]E.g., *Matter of Jancar*, 11 I&N Dec. 365 (BIA 1965) (law of Yugoslavia); *Matter of K---*, 8 I&N Dec. 73 (BIA 1958) (law of Poland).

[57]E.g., Fla. Stat. Ann. §732.108 (Supp. 1975); Ind. Stat. Ann. tit. 29, §1-2-7 (Burns 1972); N.C. Gen. Stat. §49-10 (1966).

[58]E.g., *Matter of C---*, 9 I&N Dec. 268 (BIA 1961) (law of Italy); *Matter of Mandewirth*, 12 I&N Dec. 199 (BIA 1967) (law of Austria).

[59]E.g., Ark. Stat. Ann. §61-141 (1971); Conn. Gen. Stat. §45-274 (1958); *Matter of Ramirez*, 13 I&N Dec. 666 (BIA 1971) (law of Honduras).

[60]E.g., La. Stat. Ann. (Rev. Stat.) §9.391 (1965) (children whose parents were not free to marry one another at the time of conception); *Matter of Anastasiadis*, 12 I&N Dec. 99 (BIA 1967).

Warner were born in a country where all children are legitimate or where legitimation is achieved by mere parental recognition, then his United States citizen father Cleophus Warner could establish that Serge is his legitimate or legitimated child on the exact same evidence – admission of paternity and the existence of his name on the birth certificate – which he would rely on in part to establish his parentage of his illegitimate son.

As well, claims of maternity are supported and established by the same kinds of evidence that support and establish claims of paternity. Such evidence includes birth certificates, baptismal certificates, school records, census records, affidavits, letters, photographs, remittances, proof of custody, proof of support and blood tests.[61] See this brief at pp. 42-43, *supra.* Claims of maternity and paternity are equally subjected to the close scrutiny of the immigration and consular officials who evaluate the supporting evidence which is submitted.

[61]The majority below suggested that maternity might be easier to prove than paternity because the mother's name, but not the father's, may appear on the birth certificate. (A at 58) That proposition is both erroneous and irrelevant to this case. In fact, the father's name often does appear on the birth certificate, as in the case of Mr. Warner and Mr. Fiallo. See this brief at pp. 7, 9 *supra.* Also, a mother's name often appears incorrectly on the birth certificate for a variety of reasons. For example, the mother's name on an illegitimate child's birth certificate may reflect the father's surname and not the mother's. Thus, the name of Ramon Martin Fiallo's mother, Celia Michel Rodriguez, appears incorrectly on Ramon's birth certificate as Celia Fiallo. See this brief at n.7 *supra.* There may be in some cases no birth certificate at all. In these various circumstances, the putative mother who seeks to establish her parentage of the child would be required to sustain her burden of proof by means independent

(continued)

4. The Challenged Classifications Are Plainly Irrational When Viewed In Light Of The Asserted Interest In Administrative Convenience.

Therefore, it is clear that problems of proof of parentage, and any attendant potential risks of fraud, are no different for claims of the parent-child relationship of father and illegitimate child than for claims of parent-child relationships which are recognized by the challenged provisions. It is equally clear that the comprehensive administrative procedures and rigorous investigative techniques already devised and applied to deal with claims of parentage generally, and of paternity specifically, are equally available and no less viable in handling claims of parentage made by purported fathers of illegitimate children. In all cases, failure to prove parentage results in denial of the application for the alien's entry into this country. Finally, as observed earlier, elaborate criminal provisions already exist to deal with any fraudulent claims. See this brief, at p. 40, *supra.* In light of these considerations, there can be no doubt of the patent irrationality and invalidity of the challenged provisions in denying, solely on the bases of the gender of the parent and the illegitimate birth status of the child, the plaintiff United States citizens and permanent residents

(footnote continued from preceding page)
of the birth certificate. In any event, even assuming *arguendo* that maternity is easier to prove than paternity, that distinction could not justify the statute's blanket ban on any opportunity to prove paternity of an illegitimate child, while permitting proof of maternity, since failure to sustain the burden of proving either maternity or paternity to the satisfaction of immigration and consular officials results equally in denial of the application.

and their plaintiff alien fathers and children the procedural opportunity which is given to other claimed parents and children to prove the central issue of parentage and the existence of a family unit which it was the exclusive purpose of Congress to preserve. The effective creation of an unwarranted irrebuttable presumption that United States citizens or legal permanent residents and their alien relatives who claim the particular parent-child relationship of father and illegitimate child do not have a family relationship, even if in fact they do, impermissibly transforms a question of mere "burden of proof" (*Glona v. American Guaranty and Liability Insurance Co.*, 391 U.S. 73, 76 (1968)), into an "impenetrable barrier that works to shield otherwise individious discrimination" (*Gomez v. Perez*, 409 U.S. 535, 538 (1973)), and is plainly unconstitutional. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

As this Court observed in *Stanley v. Illinois*, 405 U.S. 645 (1972), in invalidating a state statute which also flatly denied in discriminatory fashion the fundamental procedural due process rights of fathers of illegitimate children,

> . . . the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. at 656-57.

All that the plaintiff United States citizens and permanent residents seek in this case is their constitutional right to the mere opportunity to establish, on the same terms as are already accorded to other citizens and residents, that they too have parent-child relationships with their plaintiff alien illegitimate children and fathers of illegitimate children. In seeking to secure that basic procedural opportunity, plaintiffs recognize that they too, like other persons who claim a parent-child relationship under the statute, must meet their burden of establishing their claims of parentage to the satisfaction of immigration and consular officials.

POINT IV

THE CHALLENGED PROVISIONS ARE PATENTLY UNCONSTITUTIONAL NOTWITHSTANDING THAT THEY INVOLVE LEGISLATION IN THE IMMIGRATION FIELD.

The federal statutory provisions challenged in this case clearly descend to levels of arbitrariness and offensiveness which are matched by few statutes which have ever come to this Court for constitutional review. Such federal legislation is constitutionally intolerable even though it occurs in the field of immigration.

No other immigration case[62] has come to this Court with the unique coalescing of factors which exist in this case. First, no prior case placed in issue the

[62] *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding abrogation of a treaty by a Congressional statute affecting the admission to this country of Chinese laborers); *Harisiades v. Shaughnessey*, 342 U.S. 580 (1952) (upholding Congressional decision to permit deportation of alien members of Communist Party where legislative history set forth specific Congressional findings that such aliens constituted a threat to this country's national security); *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (upholding as not void for vagueness a statutory provision defining the term "psychopathic personality" where legislative history disclosed that Congress specifically intended to include homosexuals within that term and found that homosexuals posed a threat to the general welfare of this country); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding Attorney General's discretionary decision not to admit to this country, because of violation of terms of a prior visa, an alien who was statutorily excludable on a national security ground).

constitutionality of a statute whose exclusive Congressional purpose was primarily to afford rights not to aliens but to United States citizens and legal permanent residents. Where, as here, the rights of United States citizens are at stake, this Court has made it emphatically clear that "no Act of Congress can authorize a violation of the Constitution," even in the field of immigration law. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).[63] Second, none

[63] The challenged provisions would be unconstitutional even if only the rights of aliens were involved here. Both this Court and Congress have recognized that while Congress may have broad power over aliens, the constitutional function of the Court as a co-equal branch of our tripartite government must be exercised equally in a case involving immigration of aliens as in any other case. Cf. *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). The "power to exclude or expel aliens . . . is vested in the political departments of the Government . . . except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene." *Hampton v. Mow Sun Wong*, ____ U.S. ____, 48 L.Ed.2d 495, 508 n.21 (1976); House Report 1365, 82nd Cong., 2d Sess., p.6 (1952). Assuming *arguendo* that Congress has the broad power to determine which group of aliens should be excluded and which should be admitted, once Congress makes those choices, individuals within a particular group cannot constitutionally be subjected to different treatment on the basis of criteria wholly unrelated to any legitimate government interest. See *Francis v. Immigration and Naturalization Service*, 532 F.2d 268 (2d Cir., 1976). Once having determined, under the statutory scheme in question here, that the alien children or parents of United States citizens or legal permanent residents, whether the family relationship be legitimate or illegitimate, are to be admitted to this country without regard to numerical quota or labor certification requirements, Congress cannot constitutionally pick and choose among such relationships solely on the bases of the gender of the parent and the illegitimate birth status of the child.

of the prior cases implicated the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship and association in this country with their parents or children or the privileges or immunities of their citizenship and residency. Third, in none of the unsuccessful immigration cases were essentially procedural due process rights of citizens or legal permanent residents at stake (cf. *Hampton v. Mow Sun Wong*, ____ U.S. ____, 48 L.Ed.2d 495, 520 n.1 (1976) (dissenting opinion)) nor were there presented for review in those cases provisions which discriminate on double-barreled bases of sex and illegitimacy founded on archaic and overbroad stereotypes. Fourth, these prior immigration cases involved foreign policy concerns or a clearly expressed Congressional choice to exclude or expel a certain group of aliens who were specifically and clearly perceived to pose a grave threat to the national security, (*e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)), or to the general welfare of this country (*e.g.*, *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967)). In contrast, this case involves statutory provisions whose exclusive purpose was the generous one of maintaining or reuniting in this country family units which include United States citizen or permanent resident members. Clearly, considerations of foreign policy, national security, or threats to the general welfare of this country played no part in the

enactment of this benevolent and ameliorative legislation.[64]

Each of the unique features which is present here is independently sufficient to distinguish this case from all the prior unsuccessful immigration challenges decided by this Court. Thus, it is manifest that the federal statutory provisions challenged here are not saved from patent unconstitutionality merely because this Court has sustained the exercise of Congressional and executive authority in immigration cases which, upon analysis, bear strikingly little resemblance to this case.

CONCLUSION

For the reasons stated, plaintiffs-appellants respectfully request that this Court reverse and vacate the judgment of the District Court, find that INA §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into INA §201(b) (8 U.S.C.

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[64]The legislative history and the statutory scheme itself disclose that considerations of foreign policy, national security, or threats to the general welfare of this country were not involved in the passage of the provisions challenged herein. It is self-evident that provisions which were intended exclusively to benefit United States citizens and permanent residents by uniting them in this country with their parents and children have no purpose to facilitate the conduct of foreign policy. It is equally clear that the provisions did not rest upon a Congressional determination that "illegitimates" constitute a threat to our national security or welfare, since neither illegitimate children nor their fathers are totally excludable from the United States and other groups of illegitimate children and their unwed parents are accorded the benefits of the statutory right at stake in this case.

§1151(b)) and INA §212(a)(14) (8 U.S.C. §1182(a)(14)) are constitutionality invalid, in violation of the First, Fifth, and Ninth Amendments, and remand this case to the District Court with directions that it (1) issue a permanent injunction against the operation, execution and enforcement of the challenged statutory provisions, (2) determine plaintiffs' motion for class action certification, and (3) order the defendants to afford the plaintiffs the opportunity to establish their claimed family relationships and to grant them whatever immigration status they would have had but for the unconstitutional application of the challenged provisions.

Dated: August 1976

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

UNITED STATES STATUTES:

Immigration and Nationality Act §101(b)(1) and (2), (8 U.S.C. §1101(b)(1) and (2)), (66 Stat. 171 (1952), as amended by 71 Stat. 639 (1957), as amended by 75 Stat. 650 (1961), as amended by 79 Stat. 917 (1965), as amended by 89 Stat. 824 (1975)), provides:

(1) The term "child" means an unmarried person under twenty-one years of age who is –

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age eighteen years at the time the marriage creating the status of the stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under his chapter.

(F) a child under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally

saw and observed the child prior to or during adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

Immigration and Nationality Act §201(b), (8 U.S.C. §1151(b)), (79 Stat. 911 (1965)), provides:

The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants, shall be admitted as such, without regard to the numerical limitations in this chapter.

Immigration and Nationality Act §212(a)(14), (8 U.S.C. §1182(a)(14)), (66 Stat. 183 (1952), as amended by 79 Stat. 917-918 (1965)), provides:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, an (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A), (other than the parents, spouses, or children of United States citizens or of aliens, lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 203(a)(8).*

*The United States Code citations for Immigration and Nationality Act §§101(a)(27)(A), 203(a)(3), (6), (8) are 8 U.S.C. §§1101(a)(27)(A), 1153(a)(3), (6), (8), respectively.

FOR ARGUMENT

Supreme Court, U.S.
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No. 75-6297

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75–6297

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the three-judge district court (A. 51–73) is reported at 406 F. Supp. 162.

JURISDICTION

The judgment of the three-judge district court (A. 74–75) was entered on December 1, 1975. A notice of appeal to this Court (A. 75–76) was filed on December 31, 1975, and the jurisdictional statement was filed on March 1, 1976. On June 7, 1976, this Court noted

probable jurisdiction (A. 77). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(b)(1)(D) and 1101(b)(2), violate due process of law by excluding the relationship between an illegitimate child and his or her natural father from the immigration preferences accorded by the Act to the "child" or "parent" of a United States citizen or lawful permanent resident alien.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Sections 101(b)(1) and 101(b)(2) of the Immigration and Nationality Act of 1952, 66 Stat. 171, as amended, 8 U.S.C. (and Supp. V) 1101(b)(1) and 1101(b)(2) provide:

> (1) The term "child" means an unmarried person under twenty-one years of age who is—
>
> (A) a legitimate child; or
>
> (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of the stepchild occurred; or
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> (E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.
>
> (F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse

jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: *Provided,* That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further,* That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

Sections 201(b) and 212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1151(b) and 1182(a)(14), are set forth in the appendix to the brief of the appellants.[1]

[1] On October 20, 1976, Section 212(a)(14) was amended to read as follows, effective January 1, 1977 (Pub. L. 94-571, Section 5, 90 Stat. 2703):

"(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the

STATEMENT

1. The Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 *et seq.*, grants special preference immigration status to aliens who qualify as the "children" or "parents" of United States citizens and lawful permanent residents, within the meaning of the Act. Aliens who satisfy the statutory definition of this parent-child relationship may be exempt from any applicable immigration quota or numerical limitations (Section 201(b) of the Act, 8 U.S.C. 1151(b)), and may secure an immigrant visa

Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6), and to non-preference immigrant aliens described in section 203(a)(8)."

This amendment eliminates the exemption from labor certification previously available to "parents" of United States citizens and lawful permanent resident aliens, as that term is defined in section 101(b)(2) of the Act, 8 U.S.C. 1101(b)(2). Section 9(a) of Pub. L. 94-571 provides that the amendments made by that statute "shall not operate to affect the entitlement to immigrant status or the order of consideration for issuance of an immigrant visa of an alien entitled to a preference status, under section 203(a) of the Immigration and Nationality Act, as in effect on the day before the effective date of this Act, on the basis of a petition filed with the Attorney General prior to such effective date."

without obtaining a labor certification (Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14)).[2]

Section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), defines a "child" as an unmarried person under twenty-one years of age who meets certain specified criteria.[3] Included within this definition, and thus accorded a status that facilitates their entry into this country free from numerical limitations or labor certification requirements, are a legitimate or legitimated child,[4] a stepchild,[5] an adopted child,[6] and an illegitimate child seeking preference by virtue of his relationship to his natural mother.[7] The definition does not extend to an illegitimate child seeking preference by virtue of his relationship to his natural father. Similarly, the natural father of an illegitimate child

[2] The labor certification exemption has been repealed effective January 1, 1977. See note 1, *supra*.

[3] A person qualifies as a "parent" under Section 101(b)(2) of the Act, 8 U.S.C. 1101(b)(2), solely by virtue of his or her relationship to a "child."

[4] 8 U.S.C. 1101(b)(1)(A) and (C). The legitimation may occur either under the law of the child's residence or domicile or the father's residence or domicile but must take place "before the child reaches the age of eighteen years" and at a time when "the child is in the legal custody of the legitimating parent or parents." 8 U.S.C. 1101(b)(1)(C).

[5] 8 U.S.C. 1101(b)(1)(B). The child must not have "reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." *Ibid.*

[6] 8 U.S.C. 1101(b)(1)(E). The child must have been adopted before his fourteenth birthday and must thereafter have "been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." *Ibid.*

[7] 8 U.S.C. 1101(b)(1)(D).

who is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a "parent."

2. Appellants are three sets of unwed natural fathers and their illegitimate offspring. In each case the alien father or alien illegitimate child sought an immigration preference by virtue of his relationship to his citizen or resident alien child or parent, but was informed that he was ineligible for an immigrant visa unless he qualified for admission under the general numerical limitations and, in the case of the alien parents, received the requisite labor certification.

a. Appellant Ramon Martin Fiallo is a five year old illegitimate child who is a United States citizen by birth. He currently resides in this country with his mother, a permanent resident alien, and his natural father, appellant Ramon Fiallo-Sone, a citizen of the Dominican Republic who has lived in the United States since his entry in 1964 as a temporary visitor. Although they have never been married, appellant Fiallo's mother and father live together, and his mother provides for the family's financial support while his father acts as his "primary caretaker and constant companion." For unspecified personal reasons appellant Fiallo's parents do not wish to marry (A. 28, 33–36).

In January 1974, appellant Fiallo-Sone submitted a "Preliminary Questionnaire to Determine Immigrant Status" to the United States Consul in the Dominican Republic as a preliminary step for obtaining an im-

migrant visa as the "immediate relative" of his illegitimate son, a United States citizen (A. 47).[8] In response, appellant Fiallo-Sone was informed that unless he legitimated appellant Fiallo by marriage to the child's natural mother, he would be ineligible for th preferential status accorded a "parent" of an American citizen and could obtain an immigrant visa only if he first obtained a labor certification (A. 46).[9]

b. Appellant Cleophus Warner is a naturalized United States citizen and the father of appellant Serge Warner, a sixteen year old illegitimate child. Serge, a citizen of the French West Indies, lived in that country with his mother until 1969, when he

[8] "Immediate relatives," which are defined by Section 201(b) of the Act, 8 U.S.C. 1151(b), to include the children, spouses, and parents of a citizen of the United States, are exempt from the numerical limitations of the Act. In the case of alien parents, however, their citizen child must be at least 21 years of age.

[9] Appellant Fiallo-Sone would only be marginally assisted by his classification as a "parent," within the meaning of Section 101(b)(1)(D) of the Act. Since his citizen child is less than 21 years old, appellant Fiallo-Sone would still not qualify as an "immediate relative" under Section 201(b) and would therefore not be exempt from the applicable numerical limitations. See note 8, *supra*; *Faustino* v. *Immigration and Naturalization Service*, 432 F. 2d 429, 430 (C.A. 2), certiorari denied, 401 U.S. 921; *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179, 1181 (C.A. 5). Furthermore, in view of the recent amendment to Section 212(a)(14), appellant Fiallo-Sone would also be required to satisfy the labor certification requirements unless he could qualify under the savings clause of the new legislation. See note 1, *supra*.

entered the United States as a temporary visitor. During this visit, his mother married another man and requested that Serge remain in the United States with his natural father. Since that time appellant Serge Warner has remained in the United States in the company of appellant Cleophus Warner (A. 31, 36–37).

In 1972, appellant Cleophus Warner petitioned the Immigration and Naturalization Service pursuant to Section 204(a) of the Act, 8 U.S.C. 1154(a), to classify Serge as his immediate relative for purposes of obtaining an immigrant visa exclusive of numerical limitations. The District Director denied the petition because there was no evidence that Serge was appellant Warner's legitimate or legitimated offspring (A. 48).[10]

c. Appellants Trevor and Earl Wilson are permanent resident aliens and the illegitimate children of appellant Arthur Wilson, a citizen of Jamaica. Following their births in 1957 and 1959, respectively, appellants Trevor and Earl Wilson lived with their father until 1968, when they entered the United States with their mother. Thereafter, appellant Arthur Wilson has "maintained a relationship" with his illegitimate children through visits, correspondence, and support contributions (A. 29–30, 39–43).

[10] Appellant Serge Warner is presently paroled into the United States pending exclusion proceedings (A. 37).

Following the death of their mother in 1974, appellants Trevor and Earl Wilson sought to obtain an immigrant visa for their father. Although this petition apparently has not yet been rejected, denial is certain since Trevor and Earl are neither the legitimate nor legitimated children of appellant Arthur Wilson (A. 54). Appellant Wilson presently resides in Jamaica.[11]

3. Appellants instituted this action in July 1974 in the United States District Court for the Eastern District of New York to challenge the constitutionality of Sections 101(b)(1) and 101(b)(2) of the Act, 8 U.S.C. 1101(b)(1) and 1101(b)(2), under the First, Fifth and Ninth Amendments to the United States Constitution. They alleged that the statutory provisions abridged their constitutional right to equal protection of the laws by excluding unwed natural fathers and their illegitimate children from the immigration preferences accorded other "parents" and "children" by the Act and burdened the right of natural fathers and their illegitimate children to mutual association and privacy. Appellants sought to enjoin enforcement of those provisions insofar as the statute operated to

[11] Like appellant Fiallo-Sone, appellant Arthur Wilson would not benefit appreciably if he were considered the "parent" of his sons. Appellant Wilson would not be entitled to immediate relative status because his sons are neither more than 21 years old nor citizens of the United States. Similarly, he would not be relieved from the obligation to obtain a labor certification unless he could qualify under the savings clause. See note 1, *supra*.

exclude them from the immigration preferences granted other "parents" and "children" (A. 11–12).

A three-judge district court, convened pursuant to 28 U.S.C. 2282 (A. 24), granted judgment for the government and dismissed the action (A. 51–73).[12]

[12] As a threshold matter, the court rejected the government's contention that appellants Fiallo and Fiallo-Sone were precluded from challenging the denial by the United States Consul in the Dominican Republic of appellant Fiallo-Sone's petition for a preliminary determination of immigrant status. It has long been a precept of immigration law that the decision of a consular official abroad not to grant a visa is immune from judicial review. See, *e.g.*, *Rivera de Gomes* v. *Kissinger*, 534 F. 2d 518, 519 (C.A. 2), certiorari denied, No. 76–5043, October 18, 1976; *Burrafato* v. *United States Department of State*, 523 F. 2d 554, 556–557 (C.A. 2), certiorari denied, 424 U.S. 910; *Loza-Bedoya* v. *Immigration and Naturalization Service*, 410 F. 2d 343, 347 (C.A. 9); *United States ex rel. Ulrich* v. *Kellogg*, 30 F. 2d 984, 986 (C.A.D.C.), certiorari denied, 279 U.S. 868; *United States ex rel. London* v. *Phelps*, 22 F. 2d 288, 290 (C.C.A. 2), certiorari denied, 276 U.S. 630. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184, n. 3. While acknowledging this authority, the district court noted (A. 55) that "the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular nonreviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa."

In view of the integral role in the visa process played by each preliminary step prior to the formal application (see 1 Gordon and Rosenfield, *Immigration Law and Procedure* §§ 3.7–3.8 (1976)), we find unpersuasive the distinction drawn by the district court. An unfavorable determination by the consular official at the preliminary questionnaire stage is tantamount to the denial of the visa application. Thus, if appellant Fiallo-Sone had formally requested issuance of an immigrant visa, his application would have been refused on precisely the same grounds as those indicated by the consul's letter (A. 46).

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The court held, with one judge dissenting, that the classifications established by Section 101(b) of the Act were a proper exercise of Congress' plenary power over the admission of aliens and were neither "wholly devoid of any conceivable rational purpose" nor "fundamentally aimed at achieving a goal unrelated to the regulation of immigration" (A. 57). While agreeing with appellants that, in enacting Section 101(b), Congress sought to encourage families to reunify, the court concluded that this goal was not the sole consideration for the legislation and that it did not detract from Congress' extensive authority to determine which types of familial relationships merited the benefit of preferential immigrant status. In the court's view, Congress could rationally exclude aliens whose lives did not "reflect personal standards of conduct important to our society's sense of morality" (A. 56); the provisions excluding aliens claiming to be unmarried natural fathers and their illegitimate children foreclosed an avenue for numerous fraudulent claims that could pose "extremely difficult problems of investigation and proof" (A. 58); and the statutory provisions in issue facilitated the fair administration of the Act as a whole. In sum, the court concluded that the challenged provisions reflected a legitimate policy judgment "which is properly the province of the legislative branch and not the judiciary" (A. 58).

District Judge Weinstein dissented, finding that the statute worked a "blatant * * * discrimination on the basis of gender and legitimacy" (A. 66) and impermissibly burdened the "fundamental, constitutionally protected interests" of "a natural parent, whether father or mother, and a child, whether legitimate or not, * * * in mutual companionship and a life together" (A. 67).

SUMMARY OF ARGUMENT

1. The Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 *et seq.*, provides the terms and conditions upon which a native of a foreign country may enter the United States. Among the myriad restrictions on immigration included in the Act are the limitations on the number of aliens who may enter the country annually from individual foreign states (8 U.S.C. 1151, 1152) or from independent nations of the Western Hemisphere (8 U.S.C. 1101(a)(27)(A); Section 21(e), Act of October 3, 1965, 79 Stat. 921) and the requirement that aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor must receive a certification from the Secretary of Labor that there are insufficient qualified workers available in this country to perform the intended job and that the alien's employment will not adversely affect the wages and working conditions of American workers (8 U.S.C. 1182(a)(14)).

The immigration system established by the Act is not inflexible, and Congress has frequently created exemptions or allowed discretionary relief from particular provisions when necessary to the achievement of some beneficial goal. In order to maintain and re-

unify families, for example, Congress has provided that an alien who qualifies as the "parent" of a United States citizen or lawful permanent resident may enter this country without satisfying the labor certification requirements of the Act, while an alien who qualifies as the "child" of a United States citizen may be admitted without satisfying the labor certification requirements or numerical limitations. However, Section 101(b) of the Act, 8 U.S.C. 1101(b), does not define the terms "parent" and "child" solely by reference to lineage. Expressly excluded from the statutory definition, and hence denied the immigration preferences available to other categories of close relatives of American citizens and permanent resident aliens, are unwed fathers in relationship to their natural children. The principal issue in this case is whether this exclusion violates principles of equal protection embodied in the Due Process Clause of the Fifth Amendment.

2. For more than a century Congress has enacted legislation governing which aliens may be admitted to the United States and upon what conditions. And for nearly as long this Court has consistently affirmed that the power to admit or exclude foreigners is inherent in national sovereignty and entrusted by the Constitution exclusively to the political branches of government. No different result should obtain under the statute involved here. Section 101(b) is the unambiguous reflection of a long and deep-felt commitment on the part of the legislative and executive branches that not every familial relationship is entitled to preferen-

tial treatment for the purposes of immigration. Embodying as it does a substantive policy regulating the admission of aliens into the United States, the classification scheme of Section 101(b) is not an appropriate subject for judicial review.

The correctness of this conclusion is not altered because a citizen or lawful permanent resident alien asserts a constitutional "right" to familial association or privacy with the excluded foreigner. While the failure to admit an alien for permanent residence or citizenship in this country may impose a hardship upon relatives or others who are lawfully residing here and who may wish to associate with the alien, this Court has not hesitated to sanction such a result when dictated by operation of the immigration laws. Indeed, a contrary result would effectively eliminate the discretion of Congress to decide who among many possible claimants should share this country's bounty. A nonresident alien has no constitutional right to enter the United States, and a citizen or resident alien can assert no greater claim; to hold otherwise would be to deprive the government of its sovereign power to determine which aliens may enter its territory.

Nor is the settled principle of unfettered legislative discretion in immigration matters inapplicable here because Congress did not expressly state that Section 101(b) rests on considerations of foreign policy or national security. As the Court stated in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the con-

duct of foreign relations, the war power, and the maintenance of a republican form of government"—a statement that certainly cannot be doubted in regard to immigration preferences given by one country to the citizens of another.

3. Even if congressional determinations of substantive immigration policy are cognizable in the courts, the constitutionality of Section 101(b)(1)(D) must be sustained since it is a rational response to a legitimate legislative goal. The purpose behind the special immigration preferences granted to specified groups of aliens whose immediate relatives are lawfully residing in the United States was not, as appellants repeatedly but erroneously suggest, a desire to unify all families separated by our national boundaries, regardless of the circumstances of the separation or the resultant hardship to the parties. Rather, Congress sought to encourage families to *reunify* when they became separated by the immigration of a close family member to the United States, and then only under circumstances where it was likely that the separation had occasioned extreme emotional, financial, or social hardship to the family.

Thus, the Act does not grant preferential status to every alien who can prove a close biological relationship with a person lawfully in this country; to the contrary, it contains numerous exceptions which exclude from the definition a variety of persons who might commonly be considered to be a "parent" or "child." For example, preferred immigration treatment is not available to the mothers or fathers of

any child, legitimate or otherwise, who is married or over the age of twenty-one, because Congress reasonably determined that the separation of such family members from their children was unlikely either to be the result solely of the immigration laws or to cause undue harm to the affected parties.[13] Congress also had an ample basis for refusing to accord special immigration preferences to the fathers of children who are neither legitimate nor legitimated. Because such persons are unlikely to have maintained a close personal relationship with their offspring in the foreign country, their admission to the United States would not further the goal of promoting family *reunification* and would not alleviate an unusual hardship suffered as a result of this nation's restrictive immigration laws.

The Act's definitions, of course, were not crafted with mathematical exactness, and some aliens whose entry into this country might well be consistent with the statutory purpose undoubtedly are unable to meet the requirements of Section 101(b). But classifications established by Congress, especially those in an area marked by such wide legislative discretion, do not offend the Constitution merely because in practice they may result in some imprecision or inequality. See *Massachusetts Board of Retirement* v.

[13] Congress, however, has given other preferences in the immigration laws to family members who do not qualify under Section 101(b), in recognition of the fact that they may be more deserving of admission than aliens having no bonds to this country. See 8 U.S.C. 1153.

Murgia, No. 74–1044, decided June 25, 1976, slip op. 9; *Flemming* v. *Nestor,* 363 U.S. 603, 612. Congress need not have granted a preference to any alien, and the definitions of "parent" and "child" operate in the vast majority of cases to admit those whose admission was intended to be facilitated and to exclude those whose admission was thought undeserving. Congress could therefore rationally conclude that the additional benefits that would be derived from a case-by-case adjudication of each alien claiming to be a "parent" or "child" of a United States citizen or permanent resident to determine whether he presented a case of genuine family reunification or extreme hardship was not worth the administrative costs, especially since those costs would principally be borne by our consulates abroad, which have neither the manpower nor the other resources to conduct such individualized inquiries.

Furthermore, by excluding unwed fathers in relation to their illegitimate children from the immigration preference—while providing that such categories of persons may continue to immigrate into the United States under the rules generally applicable to other aliens—Congress acted to minimize the serious potential for immigration fraud. The determination of paternity of an illegitimate is difficult under the best of circumstances; it is all the more difficult when it depends upon events that may have occurred in foreign countries many years earlier. Even if, as appellants speculate, many of these fraudulent visa applications could be detected by diligent investigation, removal by

the judiciary of the statutory bar presently imposed by Section 101(b)(1)(D) could encourage a wave of false applications by aliens who previously had no hope of sharing in our nation's largesse but who may harbor the expectation, however slim, of prevailing at an inquiry. The Constitution does not prohibit immigration classifications that avoid that result.

ARGUMENT

THE EXCLUSION OF AN UNWED FATHER IN RELATION TO HIS ILLEGITIMATE CHILD FROM THE DEFINITIONS OF "CHILD" AND "PARENT" IN SECTIONS 101(b)(1)(D) AND 101(b)(2) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 IS CONSTITUTIONAL

A. THE FORMULATION OF POLICIES REGARDING THE ADMISSION OR EXCLUSION OF ALIENS FROM THE UNITED STATES IS A BASIC CHARACTERISTIC OF SOVEREIGNTY AND IS ENTRUSTED BY THE CONSTITUTION EXCLUSIVELY TO THE POLITICAL BRANCHES OF GOVERNMENT

In adopting the Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 *et seq.,* Congress acted in accordance with the ancient principle of international law that a sovereign nation has the inherent power to exclude or admit foreigners on such terms and conditions as it may prescribe. See *Kleindienst* v. *Mandel,* 408 U.S. 753, 766.[14] This firmly-established principle, dating from Roman times,[15] re-

[14] See also *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 659; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 596 (Frankfurter, J., concurring); Bar, *International Law* 708, n. 2 (Gillespie ed. 1883).

[15] Borchard, *Diplomatic Protection of Citizens Abroad* 33, 44–48 (1915).

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ceived recognition during the Constitutional Convention [16] and has continued to be an important postulate in the foreign relations of the United States and the other members of the international community.[17]

Nearly a century ago this Court recognized the power to admit or exclude aliens as inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachment—a power to be exercised exclusively by the political branches of government and not to be "granted away or restrained on behalf of any one." *The Chinese Exclusion Case,* 130 U.S. 581, 609. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320, 339. Encompassed within Congress' "plenary power to make rules for the admission of aliens" (*Boutilier* v. *Immigration and Naturalization Service,* 387 U.S. 118, 123) is a comparably

[16] See 3 *Papers of James Madison* 1277 (1840), where Madison reports Gouverneur Morris' observation during the debates that "every society, from a great nation down to a club, ha[s] the right of declaring the conditions on which new members should be admitted." Article I, Section 9, Clause 1, of the Constitution itself is an implicit recognition of Congress' authority to regulate immigration. In addition, Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, provided that British and American subjects could freely cross the Canadian border. See *Karnuth* v. *United States*, 279 U.S. 231.

[17] See, *e.g.*, Convention between the United States of America and other American Republics regarding the status of aliens, Article I, 46 Stat. 2753, 2754; Constitution of the Intergovernmental Committee for European Migration, 6 U.S.T. 603, 604 (1955); *Hines* v. *Davidowitz*, 312 U.S. 52.

broad power to "to fix the conditions under which aliens are to be permitted to enter * * * this country." *Flemming* v. *Nestor,* 363 U.S. 603, 616. Whether a particular alien or class of aliens may be allowed to enter the United States is "a matter wholly political in its character" (*Lem Moon Sing* v. *United States,* 158 U.S. 538, 548), "a matter of political outlook and national self-interest" (*Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 596, Frankfurter, J., concurring), and a matter "depend[ent] on the congressional will" (*Shaughnessy* v. *Mezei,* 345 U.S. 206, 216).

Hence, while distinctions drawn by Congress might be constitutionally suspect if embodied in domestic legislation, the courts have held without exception that Congress may employ whatever criteria it deems relevant in determining the status to accord various classes of aliens seeking to enter the United States. See *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 597 (Frankfurter, J., concurring). Aliens may therefore be denied preferential admission, or excluded from this country altogether, on the basis of race (see, *e.g., The Chinese Exclusion Case, supra; Fong Yue Ting* v. *United States,* 149 U.S. 698) or other "immutable" characteristics such as age (*Nazareno* v. *Attorney General,* 512 F. 2d 936 (C.A.D.C.), certiorari denied, 423 U.S. 832) and national origin (*Noel* v. *Chapman,* 508 F. 2d 1023 (C.A. 2), certiorari denied, 423 U.S. 824; *Dunn* v. *Immigration and Naturalization Service,* 499 F. 2d 856 (C.A. 9), certiorari denied, 419 U.S. 1106), or they may be barred because of their sexual proclivities (*Boutilier* v. *Immigration and*

Naturalization Service, supra) or political beliefs (*Kleindienst* v. *Mandel, supra*). Indeed, because the essential characteristic of immigration legislation is the choice of which foreigners may enter the United States and which may not, "every limitation in the immigration laws is to some extent discriminatory. But the authorities tell us that no affected alien can question the reasonableness or fairness of such discriminatory measures." 1 Gordon and Rosenfield, *Immigration Law and Procedure* § 2.2a (1976). And "no successful challenge ever has been made to any exercise of legislative power in this field." *Ibid.*

No alien has any constitutional right to immigrate to the United States. The congressional decision whether or to whom to extend such a valuable privilege, like the decisions whether to extend formal recognition to, enter into a treaty with, or declare war against a foreign country, is not a subject of judicial concern. With respect to the extent of congressional prerogatives over the admission and exclusion of aliens, there is "not merely 'a page of history,' *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349, but a whole volume." *Galvan* v. *Press,* 347 U.S. 522, 531. Throughout, this Court has consistently deferred to the judgment of the legislative and political branches in regard to the type of aliens who should be permitted to enjoy this nation's hospitality.[18] In sum, "that the formulation of [policies

[18] See *The Chinese Exclusion Case*, 130 U.S. 581, 609; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713; *Lem Moon Sing* v. *United States*, 158 U.S. 538; *Wong Wing* v. *United States*, 163 U.S. 228,

pertaining to the entry of aliens and their right to remain in this country] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic

237; *Li Sing* v. *United States*, 180 U.S. 486, 495; *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *United States ex rel. Turner* v. *Williams*, 194 U.S. 279; *United States* v. *Ju Toy*, 198 U.S. 253, 261; *Keller* v. *United States*, 213 U.S. 138, 143–144; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320; *Low Wah Suey* v. *Backus*, 225 U.S. 460, 467–468; *Zakonaite* v. *Wolf*, 226 U.S. 272, 275; *Tiaco* v. *Forbes*, 228 U.S. 549, 556–557; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 40; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Hines* v. *Davidowitz*, 312 U.S. 52; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542–543; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210; *Galvan* v. *Press*, 347 U.S. 522; *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118; *Kleindienst* v. *Mandel*, 408 U.S. 753, 765–770.

Contrary to appellants' contention (Br. 53), this Court's decisions in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, and *United States* v. *Brignoni-Ponce*, 422 U.S. 873, do not represent an inroad upon this consistent recognition of the plenary power of Congress to determine the conditions under which classes of aliens may be admitted into the country. Those cases involve the procedures that the government may undertake, consistent with the Fourth Amendment, to stem the illegal entry of aliens into the United States, not the power of Congress to determine which alien entries are legal and which are not. Indeed, *Almeida-Sanchez* explicitly reaffirmed the undoubted authority of Congress to exclude aliens (413 U.S. at 272), and *Brignoni-Ponce* (citing *Kleindienst* v. *Mandel*, *supra*) noted the "broad congressional power over immigration" but explained that "this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." 422 U.S. at 884.

Similarly, decisions involving the scope of procedural due process that an alien within this country must be accorded, or

as any aspect of our government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531.

B. THE EXCLUSION OF ILLEGITIMATE CHILDREN IN RELATION TO THEIR NATURAL FATHERS IS NOT REVIEWABLE BECAUSE SECTION 101(b)(1)(D) REFLECTS AN UNAMBIGUOUS CONGRESSIONAL INTENT TO WITHHOLD SPECIAL IMMIGRATION PREFERENCES FROM APPELLANTS

The principles outlined above are controlling here. The language and legislative history of Section 101(b)(1)(D) demonstrate that the statutory provision represents Congress' deliberate judgment as to the types of aliens who should be accorded immigration benefits. The exclusion of the relationship of natural father and illegitimate child from the preferred status granted many other immediate relatives of American citizens and lawful permanent residents is a clear manifestation of immigration policy. The wisdom of that policy decision is therefore not reviewable in the courts.

As we have already observed (see pp. 6–7 and nn. 3–6, *supra*), the terms "child" and "parent" in the

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the congressional power to distinguish between citizens and aliens *after* the aliens have lawfully been admitted, are not relevant to a consideration of the fundamental congressional power to determine which aliens among many to admit. Even in these areas, however, this Court has observed that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," *Mathews* v. *Diaz*, No. 73–1046, decided June 1, 1976, slip op. 13, and that exercise of the power is therefore "subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong*, No. 73–1596, decided June 1, 1976, slip op. 12, n. 21.

Immigration and Nationality Act have been carefully drawn to eliminate large groups of persons whom one would normally expect to occupy that status. A "child" must be unmarried and under the age of twenty-one. If a legitimated child or stepchild, the legitimation or marriage creating that status must have occurred before the age of eighteen, and if an adopted child the adoption must have occurred before the age of fourteen. The legitimated and adopted child must also be in the legal custody of his parents and, in the case of an adopted child, he must have lived in their custody for a minimum of two years.[19] Similarly, the term "child" includes "an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child *to its natural mother*." 8 U.S.C. 1101(b)(1)(D) (emphasis added). In light of this unambiguous language, Congress' intention is clear and there can be no doubt about which aliens are entitled to preferential immigration status.

The legislative history of Section 101(b)(1)(D) confirms that this design was deliberate. The precursor of Section 101(b), Section 4(a) of the Immigration Act of 1924, exempted from numerical quota restrictions any "immigrant who [was] the unmarried child under 18 years of age" of a United States citizen. 43 Stat. 153, 155.[20] Although the definition of "child" under the 1924 Act did not expressly distin-

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[19] The mothers and fathers of children who fail to satisfy these requirements, of course, do not qualify as "parents" under the Act. 8 U.S.C. 1101(b)(2).

[20] The age limit was raised to 21 years in 1932. 47 Stat. 656.

guish between legitimates and illegitimates, the statute was construed to provide non-quota status to alien illegitimate children only if they sought admission to the United States through their citizen mothers. See *Matter of A—*, 5 I. & N. Dec. 272, 273 (B.I.A.), reversed, 5 I. & N. Dec. 283 (A.G.); Kansas, *U.S. Immigration Exclusion and Deportation* 33 (2d ed. 1940).

As originally enacted in 1952, however, Section 101(b) of the Immigration and Nationality Act defined "child" as an unmarried legitimate or legitimated child or stepchild under the age of twenty-one, thus ostensibly excluding the relationship of mother and illegitimate child that had theretofore been accorded preferential status. 66 Stat. 166, 171. In a series of administrative decisions under the 1952 Act, the Attorney General and the Board of Immigration Appeals held that an illegitimate child whose alien mother had since married a United States citizen did not qualify as a "stepchild," *Matter of M—*, 5 I. & N. Dec. 120, 126 (A.G.), that an illegitimate alien child was not eligible for nonquota status based on her relationship to her citizen mother, *Matter of A—*, 5 I. & N. Dec. 272, 283–284 (A.G.), and that the mother of a citizen born out of wedlock did not qualify as a "parent," *Matter of F—*, 7 I. & N. Dec. 448 (B.I.A.).

In response to these decisions and to the Attorney General's recommendation that "the matter should be brought to the attention of Congress," *Matter of A—*, *supra*, 5 I. & N. Dec. at 284, the Act was amended in 1957 to add Section 101(b)(1)(D). This amendment was explicitly designed to "clarify the law so that the

illegitimate child would *in relation to his mother* enjoy the same status under the immigration laws as a legitimate child to remove any doubt of the intent of the original drafters of the act," S. Rep. No. 1057, 85th Cong., 1st Sess. 4 (1957) (emphasis added), and was specifically intended "to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock and *the mothers of such children.*" H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7 (1957) (emphasis added). As explained by Senator Kennedy, a sponsor of the amendment (103 Cong. Rec. 14659 (1957) (emphasis added)):

> [The amendment] would clarify the law so that an illegitimate child would, *in relation to his mother,* enjoy the same status under immigration laws as a legitimate child. It is believed that the drafters of this provision of the act did not intend to deprive an illegitimate child of the status he enjoyed under earlier law * * *.

See also 103 Cong. Rec. 15489 (1957) (remarks of Senator Eastland).[21]

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[21] The 1957 amendments also changed Section 101(b)(1)(B) of the Act to provide that the statutory definition of the term "child" would include stepchildren "whether or not born out of wedlock." This amendment was passed to reverse the result in *Matter of M—*, *supra*, and to "accomplish the original intent of the section" by "mak[ing] it clear that a child born out of wedlock *in relation to its mother* may be included in the term 'stepchild' and thereby enjoy the same immigration status as other stepchildren." S. Rep. No. 1057, *supra*, at 4 (emphasis added). In addition, the amendments extended preferential status to an adopted child and his parents.

Section 101(b)(1)(D) thus is not, as appellants imply (Br. 52, n. 62), an inadvertent loophole in a statute designed to accomplish family unification regardless of cost. It represents instead an intentional legislative policy choice, against the background of a half-century of experience, of the types of aliens who should be encouraged to enter this country and share our largesse. As such, the congressional decision is not appropriate for judicial review.

Contrary to appellants' contention (Br. 54), no different result is required because citizens or permanent residents of the United States may be injured by the denial of special immigration status to their alien relatives or because the resultant separation would allegedly infringe upon a "constitutionally protected interest in a familial relationship and association in this country" (Br. 19). This much is clear from *Kleindienst* v. *Mandel,* 408 U.S. 753, which concerned the power of the Attorney General to deny discretionary relief to an alien who, as a proponent of "the economic, international, and governmental doctrines of world communism," was ineligible to receive a non-immigrant visa under Section 212(a)(28)(D) of the Act, 8 U.S.C. 1182(a)(28)(D). In that case, plaintiffs, a group of American scholars who had invited Professor Mandel to speak at universities or other forums in the United States or who expected to participate in colloquia with him, conceded that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise" (408 U.S. at 762) and that "Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212(a)(28)(D) and (G)(v)" (*id.* at 767). They contended, however, that since Congress had expressly provided a discretionary waiver procedure, the executive's implementation of that power was limited by the provisions of the Constitution and that their First Amendment rights as citizens had been abridged by the government's refusal to allow them to hear, speak, and debate with Professor Mandel in person. *Ibid.*

This Court disagreed (408 U.S. at 768–769):

> Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212(a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest

against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.

The same rationale underlies the consistent judicial rejection of the analogous "derivative" claim that an alien's exclusion, deportation, or conditional admissibility would impermissibly infringe upon his citizen relative's constitutional right to "familial association." Once Congress has adopted an immigration policy that a particular class of alien may not reside permanently in this country, neither the Due Process Clause nor any other constitutional provision protects a citizen from the "calamity of being separated from family" (*Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 591), and this Court has never indicated otherwise. See, *e.g., Reid* v. *Immigration and Naturalization Service,* 420 U.S. 619 (deportation of alien parents of two citizen children); *United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U.S. 72 (deportation of alien parents of citizen child); *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537 (exclusion of alien wife of citizen).[22] Familial relationships with an

[22] See also *Burrafato* v. *United States Department of State*, 523 F. 2d 554, 555 (C.A. 2), certiorari denied, 424 U.S. 910; *Cervantes* v. *Immigration and Naturalization Service*, 510 F. 2d 89, 91 (C.A. 10); *Noel* v. *Chapman*, 508 F. 2d 1023, 1027–1028 (C.A. 2), certiorari denied, 423 U.S. 824; *Robles* v. *Immigration and Naturalization Service*, 485 F. 2d 100, 102 (C.A. 10); *Aalund* v. *Marshall*, 461 F. 2d 710, 714 (C.A. 5); *Silverman* v. *Rogers*, 437 F. 2d 102, 107 (C.A. 1), certiorari denied, 402 U.S. 983; *Faustino* v. *Immigration and Naturalization Service*, 432 F. 2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179, 1181 (C.A. 5); *Mendez* v. *Major*, 340 F. 2d 128, 131–132 (C.A. 8); *Swartz* v. *Rogers*, 254 F. 2d 338, 339 (C.A.D.C.), certiorari denied, 357 U.S. 928.

alien may be pursued, but not within the United States unless the usual criteria for immigration are met."[23]

Indeed, recognition of a constitutional right to "family unity" on the part of an American citizen or lawful permanent resident that would outweigh the country's prerogatives as a sovereign to refuse admission to any or all aliens would effectively surrender congressional control over immigration. Appellant's Ninth Amendment claims cannot be limited to relations between a father and his illegitimate child: a holding that Section 101(b)(1)(D) is invalid would call into question the constitutionality of the numerous other restrictions imposed by the Act upon the entry of immediate relatives of United States citizens. And once those obstacles to immigration had been cleared, individual citizens would in effect have the power to grant preferences merely by claiming, legitimately or otherwise, that refusing entry to a partic-

[23] Although appellants argue that "the statutory barrier to the unification of the parent and child in this country will often force the United States citizen or permanent resident child or citizen father to depart from this country" (Br. 21), this decision is little different from the choice made by that person to leave his relatives in his native land and to depart for the United States. For example, appellants Trevor and Earl Wilson separated from their father in 1968 when they entered the United States with their mother (A. 39, 41), and appellant Cleophus Warner voluntarily left his son in the French West Indies when he departed for the United States (A. 36). The "calamity of being separated from family," therefore, cannot be attributed exclusively to the Act.

ular alien would violate a constitutionally-protected right of familial association. The obvious consequence would be that, absent a constitutional amendment, Congress would be powerless to implement a basic power of every independent nation state—to decree that certain aliens may not enter, much less reside in, its territory or that they may enter only if they meet certain conditions. The Constitution does not mandate that result.

Nonresident aliens, therefore, have no constitutional right to make their home in the United States, and the citizenship of a relative imparts no greater right to overturn this country's decisions regarding immigration policy. As the Court held long ago, the authority of Congress to determine which aliens may be admitted and upon what conditions

> cannot be granted away or restrained on behalf of any one. The powers * * * are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.

The Chinese Exclusion Case, supra, 130 U.S. at 609. While a citizen or lawful permanent resident may have a privilege, protected by the Constitution, to associate freely with anyone lawfully in this country, he may not require that the immigration policy of the United States be molded to permit the entry of an alien whose preferential admission Congress has chosen not to allow.

Appellants suggest (Br. 54), however, that there should be no judicial deference to the immigration policy decisions of the political branches here because the provisions of Section 101(b)(1)(D) do not on their face implicate "considerations of foreign policy, national security, or threats to the general welfare of this country * * *." Few sections of the immigration laws expressly indicate that such considerations led to or underlie their enactment. Nevertheless, the Court's observation in *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 588–589, pertains: "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." See also *Hampton* v. *Mow Sun Wong, supra,* slip op. 15–16. This nation's immigration statutes constitute an important part of its formal relations with other countries: they express the terms and conditions under which natives of those countries may visit temporarily, permanently reside in, or become citizens of the United States. Particularly in the area of special immigration preferences, each provision of the Act serves as a lever for negotiating reciprocal immigration privileges with other nations. Each provision of the Act is an integral part of the whole; no portion may appropriately be viewed in isolation; each represents a political judgment in the context of the entire Act. These policies should be changed, if at all, only through international diplomacy or new legislation.

In sum, this case touches at the heart of Congress' heretofore unquestioned authority over the admission

of aliens. There is nothing in the Ninth Amendment that requires a departure from the constitutional principle, laid down by this Court and affirmed many times for nearly one hundred years, that Congress has the exclusive power to determine which aliens are to be welcomed and that these are matters "wholly outside the concern and the competence of the Judiciary." *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 596 (Frankfurter, J., concurring). The right to "familial association" does not carry with it the right to bring an alien into this country in ways not sanctioned by statute.

C. EVEN IF IMMIGRATION POLICY DETERMINATIONS BY THE LEGISLATIVE AND EXECUTIVE BRANCHES MAY BE REVIEWED IN THE COURTS, SECTION 101(b) MUST BE UPHELD BECAUSE IT HAS A RATIONAL BASIS AND FURTHERS VALID OBJECTIVES OF THE IMMIGRATION LAWS

Ignoring a century of constitutional history, appellants contend that the courts are free to examine the legitimacy of the policy decisions underlying Section 101(b)(1)(D) and that, when viewed in light of the standards developed for judging the validity of domestic legislation, the provision must be found to violate principles of equal protection embodied in the Due Process Clause of the Fifth Amendment. We have already indicated that the fundamental premise of appellants' argument is incorrect and that the power of Congress to legislate in the area of immigration is plenary. But even if the Court were to depart from its past rulings on the appropriate scope of judicial review of political decisions concerning the admission

of aliens, the constitutionality of Section 101(b)(1)(D) must be sustained.[24] The statutory provision is rationally related to achievement of the legislative purpose behind the special immigration preferences granted to many categories of close relatives of United States citizens and lawful permanent residents—"to keep together the family unit wherever possible" (H.R. Rep. No. 1199, *supra,* at 8)—and furthers the unquestionably legitimate goals of facilitating administrative determinations of admissibility and avoiding spurious claims.[25]

The basis of appellants' argument—and in our view its fatal flaw—is the assertion that the "exclusive Congressional purpose" (Br. 36) behind the

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[24] Because every decision by the federal government affecting aliens is distinctly political in character (*Hampton* v. *Mow Sun Wong, supra,* slip op. 12, n. 21), and because there is no domestic counterpart to the power of Congress to exclude, regulate, or deport aliens (*Mathews* v. *Diaz, supra,* slip op. 12), this Court has recognized that even legislation concerning the rights of aliens lawfully in this country is "subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong, supra,* slip op. 12, n. 21. *A fortiori,* distinctions drawn by Congress among aliens outside the United States, if reviewable at all, deserve even greater deference.

[25] Distinctions that do not implicate fundamental constitutional interests or rest upon suspect classifications do not violate principles of equal protection embodied in the Due Process Clause unless they are "patently arbitrary" and "utterly lacking in rational justification." *Weinberger* v. *Salfi,* 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor,* 363 U.S. 603, 611. See also *Mathews* v. *Lucas,* No. 75-88, decided June 29, 1976; *Richardson* v. *Belcher,* 404 U.S. 78, 81–84. Appellants do not contend that aliens have a constitutional right to enter the United States, and this Court has never held that sex (*Kahn* v. *Shevin,* 416 U.S. 351, 355, or illegitimacy (*Mathews* v. *Lucas, supra,* slip op. 10–11) is a suspect classification.

enactment of the special immigration preference provisions was the unification of families, regardless of the strength of the previous bonds between family members, the reason for their separation, or the harm occasioned by their living apart.[26] This assertion flies in the teeth of the carefully drawn definitions of "parent" and "child" in the Act, whose numerous exceptions exclude from the statutory terms a large number of persons generally considered to be members of a nuclear family (see pp. 24–25, *supra*), and the repeated references in the legislative history to the *reunification* of a previously-existing family unit.

As appellants' citations to the congressional reports and debates indicate (Br. 32–33) (emphasis added), the statute was expressly aimed at "the *preservation* of the family unit" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952)) and at "*keeping* families of United States citizens and immigrants *united*" (H.R. Rep. No. 1199, *supra,* at 7). The overriding purpose was "to *reunite* families" (103 Cong. Rec. 15497 (1957) (remarks of Senator Pastore)), especially those which "have been separated *because of the workings of our immigration law*" (103 Cong. Rec. 16719 (1957) (remarks of Senator Kennedy)), and "to *remove the personal tragedy* of the split and separated families" (103 Cong. Rec. 16307 (remarks of Representative Rodino)). See also *Immigration and Naturalization Service* v. *Errico,* 385 U.S. 214, 219–220 and n. 9.

[26] See, *e.g.*, Br. 21, 24, n. 17, 36, 37, 55, n. 64.

Congress' purpose, therefore, was not to facilitate the admission of an alien into this country because of the mere fortuity that his relative was already living here; rather, it was to grant special relief in cases of exceptional hardship to parents or children of American citizens or permanent residents who had once lived with their family and whose continued separation was the result not of choice but of the restrictive immigration provisions of the Act. Hence, children, legitimate or not, who are married or over the age of twenty-one cannot qualify for the immigration preference because Congress reasonably determined that married or adult offspring do not normally reside with their parents and that the separation of such individuals from their mothers or fathers was therefore unlikely either to create an undue hardship requiring special dispensations or to have been caused by the restrictions of the Act. 8 U.S.C. 1101(b)(1)(A). By the same token, legitimated children are not entitled to preferential immigration status unless their legitimation occurred prior to their eighteenth birthday and at a time when they were in the legal custody of the legitimating parent or parents (8 U.S.C. 1101(b)(1)(C)); adopted children must have been adopted before the age of 14 and must have lived in the custody of their adopting parent or parents for at least two years (8 U.S.C. 1101(b)(1)(E)); and stepchildren must not have reached the age of

eighteen at the time the marriage creating the status of stepchild occurred (8 U.S.C. 1101(b)(1)(B)).[27]

In each of these situations, Congress reasonably concluded that, regardless of the existence of a *bona fide* parent-child relationship, the separation of the family members under circumstances not satisfying the statutory conditions would not be unusually harsh or inequitable and that the immigration of the alien child or parent would not bring about the family *reunification* contemplated by Section 101(b).[28]

The definition of "child" in Section 101(b)(1)(D) is fully consistent with this statutory scheme. Congress could rationally determine that limitation of the special immigration benefits to the relationship of natural mother and illegitimate child, and denial of preferential status to the relationship of natural father and illegitimate child, would advance the goal of *reuniting* family members who would be living together but for the restrictions of the Act, while eliminating a large category of persons whose admis-

[27] These qualifications—like those in Section 101(b)(1)(D)—also prevent immigration fraud, as we develop below (see pp. 44–45, *infra*).

[28] Contrary to appellants' assertion (Br. 35–36), there is no anomaly in allowing the wife of the natural father of an illegitimate child to qualify as the child's "stepparent" under Sections 101(b)(1)(B) and 101(b)(2). The Attorney General has construed the statute to require proof that the alien stepchild would join an established family unit in this country. See *Matter of Stultz*, Interim Decision #2401, decided June 30, 1975 (A.G.); *Matter of Amado and Monteiro*, 13 I. & N. Dec. 179 (B.I.A.); *Matter of Soares*, 12 I. & N. Dec. 653 (B.I.A.).

sion to this country would do nothing to further that result. A natural mother has, by definition, once been united with her illegitimate child, and both reason and common experience suggest that that close relationship has continued in the vast majority of cases. No such intimacy generally exists between natural fathers and their illegitimate children, especially those fathers who have never chosen to legitimate their son or daughter.[29] Indeed, it is significant

[29] As the dissenting opinion below notes (A. 70–71), even studies favorable to appellants conclude that more than 86 percent of all illegitimate children who live with one of their parents reside with their mother. In this case, for example, although appellant Arthur Wilson lived with his illegitimate children—and their mother—for a number of years after their births, he has not lived with them for the last eight years (A. 43). Similarly, although appellant Cleophus Warner presently resides with his son, he apparently did not do so during the first nine years of the boy's life (A. 36–37). Moreover, the district court correctly noted the havoc that could be played with our immigration laws—in clear contravention of the legislative decision to limit special immigration status to those having a prior close familial relationship—if appellant's claims were to prevail (A. 59, n. 15):

"[A]n unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological father; each father could then bring over *all* of the children he has ever fathered * * *."

Appellants rely upon a mass of social science literature (Br. 26–28 and nn. 18, 19, 20, 21) in an effort to demonstrate the changing mores of parents of illegitimate children and the increasingly important role of the illegitimate father in child-rearing. Although we decline to engage appellants in a sociological debate over the proper conclusions to be drawn from these studies, we note that they relate exclusively to patterns of out-of-wedlock pregnancies in this country, rather than in the foreign countries with which Section 101(b) is concerned. The Depart-

that this obvious distinction between fathers and mothers has been a feature of our immigration and naturalization law since the First Congress. 1 Stat. 103. See *Rogers* v. *Bellei*, 401 U.S. 815, 823.

Faced with the alternatives of over-inclusiveness—opening the doors of this country to everyone who claims a biological relationship to a child or parent who is a citizen or lawful permanent resident of the United States, regardless of the strength of the bonds that previously existed between them—or under-inclusiveness—limiting the special immigration status to those persons whose admission is most likely to further the goal of family reunification and who are most likely to have suffered the harm that the provisions of Section 101(b) were designed to alleviate—the legislative and executive branches rationally determined that a conclusive, though imprecise, rule was the better course. This statutory classification represents a "reasonable empirical judgment[ ]" (*Mathews* v. *Lucas*, No. 75–88, decided June 29, 1976, slip op. 15) that the number of putative fathers who had not legitimated their illegitimate children [30] but

ment of State has estimated, for example, that 80 percent of all children born in Jamaica are illegitimate and that in only 5 percent of those cases is the child supported and cared for by his natural father. Letter from Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State, to Representative Joshua Eilberg, Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, House of Representatives, pp. 2–3. A copy of this letter is being lodged with the Clerk of this Court and is being furnished to counsel for appellants.

[30] Legitimation, of course, would conclusively establish the familial unity that legitimacy normally demonstrates and that

who could make the requisite showing of a formal, pre-existing familial relationship was insufficiently large to justify adoption of a method of case-by-case adjudication that a contrary definition would have required.

it was the Act's intent not to disrupt. See 8 U.S.C. 1101(b)(1)(C). Although appellants contend that legitimation often will be difficult or impossible, we fail to comprehend why this should be so in the vast majority of cases. Appellant Fiallo-Sone, for example, gives no reason for his refusal to marry his son's mother (A. 54), while appellant Arthur Wilson does not explain why he could not marry Leonie Moses during the 11 years he lived with her and their children (A. 42–43). Moreover, legitimation may occur under the law of either the father's or the child's domicile or residence (8 U.S.C. 101(b)(1)(C)) and at least 19 States allow a putative father to legitimate his offspring even when the natural mother is married or deceased. See Ala. Code, title 27, § 11 (Cum. Supp. 1973) (written declaration of paternity); Alaska Stat. § 25.20.050 (1975) (written acknowledgment or court adjudication of paternity); Ariz. Rev. Stat. Ann. § 8–601 (Cum. Supp. 1975) (every child legitimate child of natural parents); Cal. Civil Code § 7001, *et seq.* (West, Cum. Supp. 1976) (every child legitimate child of natural parents), Del. Code Ann., title 13 § 1301 (1975) (written acknowledgment of paternity); Ind. Stat. Ann. § 29–1–2–7(b)(1) (1972) (establishment of paternity during father's lifetime); La. Rev. Stat. Ann. § 9:391 (Cum. Supp. 1976) (written declaration of paternity); Me. Rev. Stat. Ann., title 18 § 1003 (1965) (written acknowledgment or court adjudication of paternity); Mich. Stat. Ann. § 27.3178(153) (Cum. Supp. 1976) (written acknowledgment of paternity); Miss. Code Ann. § 93–17–1 (1972) (court adjudication); N.C. Gen. Stat. § 49–10 (Cum. Supp. 1975) (petitioning court by putative father); N.D. Cent. Code § 14–17–01 *et seq.* (Cum. Supp. 1975) (every child legitimate child of natural parents); Ohio Rev. Code Ann. § 2105.18 (Cum. Supp. 1975) (application by putative father to court); 10 Okla. Stat. Ann. § 55 (1966) (acknowledgment of paternity); S.C. Code § 15–1384 (1962) (petitioning court by putative father); S.D. Comp. Laws § 25–6–1 (1969) (public acknowledgment of paternity and receipt of child into family); Tenn. Code Ann. § 36–302 (Cum. Supp. 1975) (petitioning court);

Weinberger v. *Salfi*, 422 U.S. 749, supports the validity of the congressional decision. There, the Court was faced with a duration-of-relationship requirement in the Social Security Act which defined "widow" so as to exclude a surviving wife from death benefits if her marriage did not precede the wage-earner's death by at least nine months. The eligibility test was conclusive, raising an "irrebutable presumption" that any marriage entered into within the statutory period was for the purpose of obtaining survivor's benefits. Despite the fact that the legislation "swe[pt] more broadly than the evils with which [it was designed] to deal" (*id.* at 784), the Court upheld its constitutionality, finding that "Congress, its concern having reasonably been aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777.

The criterion applied by the Court in *Salfi* was not whether the "statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute" (*ibid.*), but whether the objective standards established by the statute "bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility" (*id.* at 772). As the Court explained last Term in *Mathews* v. *Lucas*, *supra*, slip op. 13–14, which sustained a legislative presumption similar to that in issue here:

> Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

Section 101(b) unquestionably meets this test, for, as we have already explained, each of the statutory definitions of "parent" and "child" has been carefully drafted to carve out a specific class of aliens reasonably thought to be most likely to suffer the hardships brought about by the separation of a close family unit and, hence, to be most deserving of special immigration status.[31]

Tex. Fam. Code Ann. § 13.01 (1975) (petitioning court by putative father within one year of illegitimate birth); Utah Code Ann. § 78–30–12 (1953) (acknowledgment of paternity and receipt of child into family).

[31] As *Salfi* demonstrates (see also *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 377), appellants' assertion that conclusive presumptions invariably violate due process is incorrect. Each statutory presumption in the cases on which appellants rely (Br. 23–24) was invalidated because the Court found that it was not rationally related to the asserted legislative purpose and that it rested on judgments that were often contrary to fact. See *Turner* v. *Department of Employment Security*, 423 U.S. 44, 46; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648–653; *Jimenez* v. *Weinberger*, 417 U.S. 628, 636; *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 643, 646; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 538; *United States Depart-*

Indeed, the considerations underlying the adoption of the "bright-line" test of Section 101(b)(1)(D) are stronger than in *Salfi* or *Lucas,* because of the far greater incentives and opportunities for fraud in the area of immigration—a problem that has been characterized as "rampant." [32] Determinations of paternity are inherently difficult under the best of circumstances (see *Gomez* v. *Perez,* 409 U.S. 535, 538), but they are even more so when the child has been born, perhaps many years earlier, in a foreign country.[33] Unlike the identity of the mother, which will often appear on the

ment of Agriculture v. *Murry,* 413 U.S. 508, 514; *Vlandis* v. *Kline,* 412 U.S. 441, 452; *Stanley* v. *Illinois,* 405 U.S. 645, 656–657. In addition, several of these challenged statutory classifications involved constitutionally protected interests, which require a stronger showing of mathematical accuracy in the presumption.

Moreover, unlike *Jimenez,* Section 101(b) "does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Mathews* v. *Lucas, supra,* slip op. 17. Large categories of legitimate children also are deprived of making an individualized showing of previous, close family association, because Congress reasonably determined that the percentage of legitimate aliens in the excluded categories, like the percentage of illegitimate aliens, who could make the requisite showing was too small to incur the added inconvenience, expense, and fraudulent claims that would arise from case-by-case determinations.

[32] Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States,* 13 San Diego L. Rev. 34, 35–36 (1975). The principal methods of immigration fraud include the use of false or altered documents and sham marriages, and the major sources of the illegal alien flow are underdeveloped countries with high—and largely illegitimate—birth rates. *Ibid.*

[33] See Hearings on H.R. 10993 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 2d Sess. 6 (July 28, 1976).

birth certificate and which frequently can be corroborated by the testimony of relatives, midwives, or medical personnel, the sole evidence that a man has fathered a particular child is often the testimony of the mother, and she may not know. Indeed, two or more men may claim paternity of the same child.

It is no answer to these significant difficulties to suggest, as appellants do (Br. 42–44), that the government may detect instances of fraud through more thorough investigative techniques. Even if increased diligence could ferret out false applications—which we doubt—appellants' solution would impose "a substantial burden on the system," *Nazareno* v. *Attorney General, supra,* 512 F. 2d at 940, and that burden would fall primarily on United States consular officials overseas, who have neither the financial resources or manpower to do the job nor the authority to elicit all relevant information from foreign agencies. Furthermore, the mere hope of prevailing at an inquiry would encourage the filing of bogus petitions that the present statutory bar to eligibility avoids. Such time consuming procedures would inevitably delay issuance of immigration visas to those aliens who are unquestionably qualified under the Act. As the Court concluded in *Salfi* (422 U.S. at 781):

> While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course.

While in a particular case the provisions of Section 101(b) might appear to operate inequitably, Congress acted reasonably when it decided that the price to be paid to avoid these inequities would be prohibitive and might lead to far more serious unfairness. Any system of immigration law that prevents free entry into this country from abroad necessarily imposes hardship on those who seek but who are denied admission. As appellants concede (Br. 38), however, neither illegitimacy nor parentage of illegitimate children is an excludable characteristic under the Act. Appellants therefore remain free to request immigrant visas under the rules that most other aliens must satisfy. Indeed, in recognition that certain aliens may not be eligible for special immigration status but may nonetheless have a greater claim to enter the United States than other aliens, Congress has granted preferences in the receipt of visas subject to numerical limitations to relatives of United States citizens or lawful permanent residents who do not fall within Section 101(b). See Section 203(a) of the Act, 8 U.S.C. 1153(a); 1 Gordon and Rosenfield, *supra,* at § 2.27.[34]

[34] If appellants' plight requires further assistance, relief may be sought either through private legislation or an amendment to the Act. In this regard, we note that a bill (H.R. 10993) introduced in the 94th Congress would have placed natural mothers, natural fathers, and illegitimates claiming preferential immigration status by virtue of their relationship to either parent on an equal plane under Section 101(b). At hearings held in July 1976, representatives of the Department of State and the Department of Justice stated that the Executive Branch did not object to the proposal in principle but believed strongly that the bill should be amended to include adequate safeguards to reduce the substantial possibility of fraud. Hearings on H.R. 10993, *supra*, at 7–9, 37. The history of Section 101(b), beginning with its initial restrictive provisions in 1952, its liberalization in 1957, and the more recent attempts at further liberalization—each in response to a particular problem and with due regard to the difficulties that might ensue from the change—demonstrates that any expansion of the definitions of "parent" and "child" should occur through the legislative process and that Congress should be allowed to proceed deliberately. See *Geduldig* v. *Aiello*, 417 U.S. 484, 495.

In any event, the ultimate decision regarding which aliens should be admitted to the United States is a political one. Congress need not have allowed the admission of, much less granted an immigration preference to, any aliens; the classifications it instead adopted in Section 101(b)(1)(D) are rationally related to the accomplishment of a legitimate immigration purpose and do not offend the Due Process Clause.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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RAMON MARTIN FIALLO, *etc., et al.*,

Appellants,

v.

EDWARD H. LEVI, individually and as Attorney General of the United States, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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Hearings on H.R. 10993 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 2d Sess. (July 28, 1976)	21
Sauber, "The Role of the Unmarried Father," 4 *Welfare in Review* 15 (Nov., 1966)	18
U.S. Bureau of the Census, *1 U.S. Census of the Population, Characteristics of the Population Pt. 1, U.S. Summary* – Sec. 2, Table 206 (1973)	17-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6297

RAMON MARTIN FIALLO, *etc., et al.*,

Appellants,

v.

EDWARD H. LEVI, individually and as Attorney General of the United States, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

SUPPLEMENTAL STATUTORY SCHEME

Since the filing of the appellants' main brief in this case in August, 1976, a new federal law has been enacted amending the Immigration and Nationality Act in certain respects relevant to this case. Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571. The recent amendments make the Eastern

Hemisphere preference system, and, accordingly, the exemption from labor certification based on certain preference classifications, applicable to the Western Hemisphere. Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571, Sec. 2(1) amending INA §201(a) (8 U.S.C. §1151(a)); Sec. 4 amending INA §203 (8 U.S.C. §1153); Sec. 5 amending INA §212(a)(14) (8 U.S.C. §1182(a)(14)). Since there is not a preference classification for the parent of a minor United States citizen or legal permanent resident, the Western Hemisphere parent is no longer exempted from the labor certification requirement under the new law.[1] Thus this recent amendment has a significant effect on the posture and scope of this case. Appellants' claims which challenge the denial of labor certification exemption to the father of an illegitimate citizen or legal permanent resident child no longer present a viable issue prospectively beyond January 1, 1977, the effective date of the new law.[2] The amendment leaves

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[1] Prior to the recent amendments, quota numers were distributed to Eastern Hemisphere natives according to a preference system, but to Western Hemisphere natives on a first come, first serve basis. Immigration and Nationality Act of October 3, 1965, Pub. L. 89-236, Sec. 3 79 Stat. 912-915; Sec. 21(e) 79 Stat. 921. Eastern Hemisphere natives who were in certain preference categories were exempted from the labor certification requirement. As there was no preference system covering Western Hemisphere natives, the statute specified that certain relatives of United States citizens and legal permanent residents, including their parents, were exempt from a labor certification requirement. Immigration and Nationality Act of October 3, 1965, Pub. L. 89-236, Sec. 10 79 Stat. 917-918.

[2] Although these issues are no longer of the same consequence as formerly, the claims of appellants Fiallo and Wilson are nonetheless not moot. The new law contains a savings clause,

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remaining as the central issue in this case the question of the constitutionality of the statutory provision which discriminatorily denies a United States citizen unwed father the entry into the United States of his illegitimate child without regard to the numerical quota or labor certification requirements, by excluding them

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which provides that a person is entitled to receive the status for which he was eligible under the old law if an application for such status was made prior to January 1, 1977. Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571, Sec. 9. The Fiallo and Wilson children have filed the appropriate forms to gain labor certification exemptions for their fathers, and thus they would be entitled, in the event that this Court found the prior law to have been unconstitutionally applied to them, to whatever immigration status they would have had but for the unconstitutional application of that law. *Stanton v. Stanton*, 421 U.S. 7, 11 (1975).

The so-called doctrine of consular non-reviewability, invoked by the Government (Appellees' brief, p. 11 n.12), does not constitute a bar to review of the constitutional claims of appellant Fiallo in this Court. That doctrine is said to bar administrative or judicial review of the decision of a United States consul abroad concerning the issuance or denial of a visa. The doctrine, even if viable, has no application here since, as found by the Court below (A- 54-55), appellant Fiallo is immediately concerned about the preliminary declaration of his immigrant status, not with his visa application. In any event, he does not seek judicial review of the ultimate outcome of the Consul's discretionary determination on his visa application, but rather only of the purely legal question of the constitutionality of a statute which bars the consul from even exercising his discretion in passing on the visa application. The distinction between the propriety of judicial correction of an immigration official's threshold error of law and the impropriety of judicial control over the ultimate discretionary decision iteself is well-settled. *Perkins v. Elg*, 307 U.S. 325, 349-350 (1939); *McGrath v. Kristensen*, 340 U.S. 162, 165, 168, 171 (1950); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Jay v.*

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from the definition of "parent" and "child."[3] This is the issue presented by the appellant Warner.

Under both the prior and the new immigration law, a United States citizen "parent" is given statutory entitlement to the entry of his "child" as an "immediate relative" into the United States without regard to either a numerical quota or a labor certification if the citizen "parent" exercises his perogative to petition for such classification of his "child." INA §201(b) (8 U.S.C. §1151(b)); Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571, Sec. 5 amending INA §212(a)(14) (8 U.S.C. §1182(a)(14)); INA §204(a) (8 U.S.C. §1154(a)). Under the new law, a Western Hemisphere as well as an Eastern Hemisphere child of a United States citizen, if without immediate relative status, is considered a

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Boyd, 351 U.S. 345, 354 (1956); *Sovich v. Esperdy*, 319 F. 2d 21 (2 Cir. 1963). *Also Wong Hing Hang v. I.N.S.*, 360 F. 2d 715, 717 (2 Cir. 1966); *Kovac v. I.N.S.*, 407 F. 2d 102, 104 (9 Cir. 1969); *Application of Maringolo*, 303 F. Supp. 1389, 1392, 1394 (S.D.N.Y. 1969); *United States v. Esperdy*, 188 F. Supp. 491, 499-500 (S.D.N.Y. 1960). The Government has plainly not sustained its heavy burden of overcoming by clear and convincing evidence the strong presumption that Congress did not mean to prohibit all judicial review, under the Administrative Procedure Act and the Declaratory Judgment Act, of errors of law made by consular officials. *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *Cf. Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2 Cir. 1966). Any suggestion that the ultimate legal issue of the constitutionality of a federal statute is wholly immune from judicial review would itself raise serious constitutional questions. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

[3] See Appellants' main brief at page 6.

non-preference immigrant.[4] It is extremely unlikely that a non-preference immigrant will be able to enter this country. The separate annual numerical quota for each country is fully allocated by statute among seven preference categories. A non-preference immigrant is eligible for an immigrant visa only when by chance a quota number is not used within any of the seven preference categories. INA §203 (8 U.S.C. §1153), as amended by Immigration and Nationality Act of October 20, 1976, Pub. L. Sec. 4. Further, a non-preference immigrant must also satisfy the difficult labor certification requirement.[5] INA §203(a)(8) (8 U.S.C. §1153(a)(8)).

ARGUMENT

POINT I

CONTRARY TO THE GOVERNMENT'S CONTENTIONS, THE CONSTITUTIONAL ARGUMENTS OF THE APPELLANT UNITED STATES CITIZENS ARE NARROWLY DRAWN, AND THIS CASE IS UNIQUE AMONG CASES INVOLVING IMMIGRATION LAW WHICH HAVE COME BEFORE THIS COURT.

[4] Prior to the recent amendments to the immigration act, the Western Hemisphere child without immediate relative status would be subject to the general Western Hemisphere quota and a labor certification requirement. Because the amendment extended the Eastern Hemisphere preference system to the Western Hemisphere, now both the Western and the Eastern Hemisphere citizen's child without immediate relative status is considered a non-preference immigrant.

[5] The difficulty of satisfying the labor certification requirement is explained in appellants' main brief at page 5.

The Government distorts the nature and implications of this case. Its position is fundamentally premised on the proposition that all cases involving provisions of the immigration law are essentially interchangeable and indistinguishable. The Government thus urges this Court to view this case as merely one which concerns exclusively the interests of aliens seeking to immigrate into this country, which makes little more than a mere "hardship" plea, and which attempts to "eliminate" Congress' power to ever determine which aliens may be excluded from this country. (Appellees' brief, p. 15.) Appellants, on the other hand, urge this Court to reject the Government's "all-or-nothing" argument as unworthy of a principled approach to constitutional adjudication, and rather to apply a discerning and discriminating analysis to this case. So viewed, this case is not merely another in a long line of unsuccessful and indistinguishable immigration challenges, but rather is unique. It thus becomes clear that this Court's invalidation of the extreme form of discrimination against citizens worked by these statutory provisions will not undermine or disturb the results in any of this Court's prior immigration decisions, nor will it have any of the dire consequences predicted by the Government here.

It is important to emphasize again precisely what this case does and does not involve. This case concerns the constitutionality of a statute whose exclusive Congressional purpose is to afford rights, not to aliens, but to United States citizens. The statute in question was indisputably passed to achieve the benevolent result of allowing United States citizen parents to choose to be reunited in the United States with their alien children. The legislative history discloses the total absence of any foreign policy concerns or a Congressional choice to exclude or expel aliens who posed a

threat to the national security or general welfare of this country. Rather, the gender of the citizen parent and the illegitimacy status of the alien child are the sole bases for the statute's denial to the United States citizen unwed father of any opportunity to establish his family relationship with his alien illegitimate child and to secure their reunification in this country. The interest of the United States citizen father which is thereby inevitably infringed is his fundamental constitutional interest in the companionship, care, custody and management of his child, and as a possible consequence, the incidents of his citizenship.[6] These features of the instant case fundamentally distinguish it from each and every one of the prior immigration cases which are relied upon by the Government.

It cannot be overemphasized that the statutory rights involved, and the constitutional rights asserted, in this case are those of United States citizens, not aliens.[7] While the alien child may in fact benefit, the

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[6] The Government attempts to casually dismiss the serious infringement worked by the statute on the fundamental constitutional interests of a United States citizen in a parent-child relationship and the incidents of citizenship by observing that at some time appellant parents and children were physically separated. (Appellee's brief, p. 31 n. 23). Such separation from their children, however, is equally inevitable for those parents who receive the benefit of the statutory entitlement in issue here. The citizen parent seeking the statute's benefit often will be a naturalized citizen. To become a naturalized citizen and thus to be eligible for the statute's benefit, a person must first spend five years in the United States as a legal permanent resident. INA §316(a) (8 U.S.C. §1427(a)). Those persons thus will also be separated from their children whom they seek to bring into this country under the statute without regard to numerical quota or labor certification requirements.

[7] This Court has held that provisions of the Immigration and Nationality Act cannot infringe the constitutional rights of

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statutory entitlement at issue here is clearly for the exclusive benefit of the United States citizen. Thus, the alien child cannot be classified as an "immediate relative" unless the United States citizen exercises his/her prerogative to petition for that classification. INA §204(a), (8 U.S.C. §1154(a)). Contrary to the Government's contention, appellants do *not* maintain that any citizen and alien relative who claim hardship or an interest in family unity must automatically be united in this country. Rather, appellants contend that the Constitution forbids Congress, when it is concerned only with maintaining or reuniting family units, from discriminatorily giving only some but not other United States citizens, solely on the bases of gender and legitimacy, the opportunity to establish their right to a statutory entitlement. That statutory discrimination is made even more egregious by the inescapable fact that the statutory discrimination inevitably infringes a United States citizen's constitutionally fundamental interest in his association with his child.[8]

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United States citizens. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). *Cf. Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964).

[8] The cases cited by the Government are inapposite. For example, in *United States ex rel Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court held that the German wife of a United States citizen who sought to enter the United States in 1948 could be found excludable for a national security reason without a hearing upon the Attorney General's determination that the information involved was of a confidential nature, the disclosure of which would be prejudicial to the public interest. This action was pursuant to a law which sanctioned this procedure when the United States was at war or during a national emergency proclaimed by the President. The Court found the law and the

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The case relied upon by the Government to support its argument that this Court should automatically and without analysis affirm the legislative discrimination involved here bear strikingly little resemblance to this unique case. Each of those cases diverges fundamentally from this case in one or more of several crucial respects. None of these prior cases involved the constitutionality of a statute whose exclusive Congressional purpose was solely to afford rights not to aliens but to United States citizens, and to secure the fundamental constitutional interests of citizen parents in a familial relationship and association in this country with their children. In none of the immigration cases relied on by the Government were essentially procedural due process rights of citizens at stake, nor were there presented for review in those cases statutory provisions which discriminate on the dual bases of sex and illegitimacy founded on archaic and overbroad stereotypes. Finally, these prior immigration cases uniformly involved foreign policy concerns[9] or a clearly expressed Congressional choice to exclude or expel a certain group of aliens who were specifically and clearly perceived to pose a grave threat to the national

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procedure "reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II." *United States ex rel Knauff v. Shaughnessey, supra*, at 544. The alien in that case did not claim that the mere fact that she was related to a United States citizen saved her from deportation or exclusion. No claim was or could have been made that a citizen was being subjected to discrimination.

[9] *See, for example, Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

security[10] or to the general welfare[11] of this country. See Appellants' main brief, pp. 52-55.

The Government's heavy reliance upon *Kleindienst v. Mandel*, 408 U.S. 753 (1972), is clearly misplaced. In that case, this Court rejected the claim of certain United States citizens that their First Amendment rights were unconstitutionally violated when the Attorney General refused entry into the United States to Mr. Mandel, who was to make a speech to them. Mr. Mandel, however, was concededly excludable as an alien who advocated the doctrines of world communism and was not eligible for a discretionary waiver because he had flagrantly abused the terms of his entry on a prior trip to this country. As this Court observed, the appellees' argument in *Kleindienst* would have "prove[d] too much," since it would have required that every alien, whether or not excludable from the United States, would have to be granted entry into the United States, whenever a United States citizen wanted to meet and talk with him. 408 U.S. at 768-69. The instant case is not comparable. The invalidation of the statutory provisions challenged here would *not* as insisted by the Government, enable any citizen to successfully demand the entry into the United States, under any circumstances, of any alien relative with whom he/she could claim a family tie. (Appellees' brief, pp. 30-32.) The result of the statute's invalidation would only prohibit this extreme form of Congressional discrimination, whereby *all* United States citizen fathers of illegitimate children are flatly denied *any* opportunity to qualify for a statutory entitlement which is automatically

[10] *See, for example, Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1951); *Galvan v. Press*, 347 U.S. 522, 529 (1954).

[11] *See, for example, Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967).

afforded to other similarly situated citizen parents. It would have the effect only of placing similarly situated United States citizens on equal footing in terms of their opportunity to qualify their alien children for entry into the United States without regard to numerical quota or labor certification requirements, and those children would, in any event, have to satisfy all other legal requirements for admission.

Finally, even those cases which speak in the broadest terms about Congressional power when only the rights of aliens are involved confirm the reviewability of the constitutionality of any Congressional act.

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is *required by the paramount law of the Constitution*, to intervene. (emphasis added)
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> *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

Hampton v. Mow Sun Wong, ___U.S.___, 48 L.Ed. 2d 495, 508 n. 21 (1976). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Mathews v. Diaz*, ___U.S.___, 48 L.Ed.2d 478, 491 (1976). *Cf. Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950). Congress itself agrees. House Report 1365, 82nd Cong., 2d Sess., p. 6 (1952). Indeed, the proposition that the Government sets forth, that a whole area of law is totally immune from constitutional inquiry, is completely repugnant "to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government," of which the

judiciary is a co-equal branch. *United States v. Nixon*, 418 U.S. 683, 704 (1974). Since the creation of our government, it has been a cardinal principle that the Supreme Court is to be the ultimate interpreter and guardian of the Constitution.[12]

> Many decisions of this Court . . . have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Id., at 177, 2 L.Ed. 60.
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> *United States v. Nixon*, 418 U.S. 684, 703 (1974)[13]

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[12] *See* The Federalist Papers, No. 78.

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.
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> Hamilton, Alexander, The Federalist No. 78 in *The Federalist* (H. Lodge, ed., G.P. Putnam's Sons, 1888) p. 484-485.

[13] Should this Court conclude that the cases relied upon by the Government do stand for the proposition that Congress unvaryingly has absolute power to enact unconstitutional statutes which are not subject to judicial review, then appellants respectfully request that this Court re-examine and overrule those cases insofar as they might immunize this statute from constitutional invalidation. The rationale which the Government advances to support its argument of judicial non-reviewability is, upon analysis, without validity.

The Government's position relies on four erroneous premises. First, the Government contends that no provision of immigration law is subject to constitutional scrutiny because Congress' absolute power is based on a "principle of international law that a

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POINT II

CONTRARY TO THE GOVERNMENT'S CONTENTIONS, THE CHALLENGED STATUTORY CLASSIFICATIONS ARE UTTERLY IRRATIONAL IN LIGHT OF THE ACTUAL LEGISLATIVE PURPOSE AND IN VIEW OF THE ARCHAIC AND OVERBROAD STEREOTYPE UPON WHICH THEY REST, AND ACCORDINGLY ARE UNCONSTITUTIONAL.

Without the citation of any legislative history to support its position, the Government asserts that the

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sovereign nation has the inherent power to exclude or admit foreigners." Appellees' brief, p. 19. But under our form of government the sovereign is limited by the Constitution; there can be no extra-constitutional Congressional power.

> This power cannot. . .be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitutions governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.
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> *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

See also Appellants' reply brief, *supra*. Second, the Government argues that absolute deference of the judiciary to Congressional power is required because of the inevitable interrelationship between immigration policy and foreign relations and national security policy. Appellees' brief, p. 33. But the Congressional exercise of both the foreign affairs and war power are, upon analysis and in appropriate cases, subject to constitutional scrutiny by the judiciary.

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blanket statutory discrimination against United States citizen unwed fathers of alien illegitimate children is supportable because it allegedly represents a considered and deliberate Congressional policy choice, based on the Congress' "common experience" that fathers of illegitimate children do not have close family ties with their illegitimate children. Thus, the Government essentially

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> There are sweeping statements to the effect that all questions touching foreign relations are political questions... Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.
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> *Baker v. Carr*, 369 U.S. 186, 211 (1962). [T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit...[E]ven the war power does not remove constitutional limitations.
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> *United States v. Robel*, 389 U.S. 258, 263-264 (1967).

The Congressional exercise of power over immigration, if derived from the foreign affairs and war power, should be no less judicially reviewable than are other Congressional enactments resting on war and foreign policy powers. Third, the Government, in contending that no immigration statute is reviewable, asserts that this Court has upheld discrimination on the basis of race contained in an immigration law, citing *Chae Chan Ping v. United States,* 130 U.S. 581 (1889). That case involved a statute which excluded only Chinese laborers from among nationals of China. But even if that case did uphold racial discrimination, it was decided at a time when racial discrimination was considered constitutional, *Plessy v. Ferguson*, 163 U.S. 537 (1896), a premise which has since been clearly repudiated. *Brown v. Board of Education*, 347 U.S. 483 (1954). Finally, this Court has in recent years rejected the distinction between "rights" and "privileges" as a basis for immunizing whole areas of the law from judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Contrast Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954).

attempts to engraft onto Congressional intent a purportedly conscious, willful, and calculated judgment on the part of Congress of the lack of family ties between unwed fathers and their illegitimate children. The Government hypothesizes that this judgment in turn led Congress to make the alleged "reasonable empirical judgment" that case-by-case adjudications of the family relationships of unwed fathers and their children simply were not worth making. As this Court has repeatedly emphasized, however, the legitimate legislative purpose in light of which the rationality of federal statutory classifications can be measured must rest upon a surer footing than the mere unsubstantiated speculation of the parties bereft of any supportive legislative history.

As Appellants have demonstrated (see Appellants' main brief, pp. 31- 36), the exclusive purpose of Congress in enacting the challenged statutes was the benevolent one of enabling United States citizen parents to be reunited in this country with their alien children, whether the family relationship be legitimate or illegitimate.[14] Upon a more careful analysis than the

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[14] The Government nonetheless advances other interests as justification for the statutory classifications. But the conspicuous failure to summon any legislative history to support its position confirms, as appellants demonstrated in their main brief, that the interest asserted by the Government in facilitating administrative convenience by reducing the potential for spurious claims (see appellee's brief, at pp. 44-6) is a manufactured and wholly hypothetical objective with which Congress had no concern in enacting the challenged provisions. Thus the rationale of preventing fraudulent claims and furthering administrative convenience is unavailable as a justification for the discrimination worked by the statutory classifications. *Mathews v. Lucas,* __U.S.____, 49 L. Ed. 2d 651, 662 n. 14 (1976); *Weinberger v. Wiesenfeld,* 420

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Government undertakes, it is manifest that the exclusive basis and underpinning for the challenged classifications was a bare, unarticulated, and unconscious stereotype that unwed fathers of illegitimate children do not, while other parents do, have family ties with their children. As appellants have demonstrated in their main brief, pp. 25-29, that stereotype does not accord with reality and is grossly overbroad. Thus, simply stated, the question becomes whether the Congress can, consistent with the Fifth Amendment to the United States Constitution, make gross distinctions among United States citizens on the basis of sex and illegitimacy—distinctions which inevitably infringe the constitutionality fundamental associational rights of citizens—solely and exclusively on the basis of a bare, unconscious stereotype which involves archaic and outmoded generalizations concerning the relationship between unwed fathers and their illegitimate children.

The statistics and sociological data cited by the appellants and unrebutted by the Government, and the factual circumstances of the appellants' cases, certainly put to rest the suggestion that citizen unwed fathers should be absolutely denied any opportunity to establish their family relationships with their illegitimate children, while other parents are conclusively presumed to have relationships with their children. Yet that is precisely the proposition that is embodied in the challenged statutory provisions. It is wholly irrational and impermissible for Congress, based exclusively on an

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U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Moreover, as appellants have demonstrated in their main brief, pp. 40-51, the purported interest in administrative convenience is, in any event, not advanced in a rational manner by the challenged classifications.

archaic and overbroad stereotype, to legislate the array of conclusive presumptions challenged here: (1) that all United States citizen wives of the fathers of illegitimate children have close ties with their husbands' illegitimate children, yet that none of the fathers of those same children ever have close ties with their own children; (2) that all fathers of out-of-wedlock children who happen to live in places where all children are considered legitimate[15] always have close ties with their children, yet that none of the fathers of out-of-wedlock children who happen to live elsewhere ever have close ties with their children; (3) that all fathers of illegitimate children who live in places where a simple action such as the written acknowledgement of paternity legitimates their children always have close ties with their children, yet that none of the fathers of illegitimate children who have also acknowledged their children in writing but who do not live in places which recognize such actions as legitimation ever have close ties with their children; (4) that all divorced or separated fathers always have close ties with their children, yet that none of the fathers of illegitimate children ever have close ties with their children[16]; (5)

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[15] See Appellants' brief, p. 46 n. 50; Appellees' brief. p. .

[16] As demonstrated by the figures from the most recent census, presented by appellants in their post-argument memorandum to the three-judge court below, this presumption is not factually valid. The 1970 census showed that 14.3% of the "single parent" (never married, not divorced, widowed or separated) families with "own children," as compared to 10% of the divorced families with "own children" and 7.4% of the separated families with "own children," were headed by fathers. Correspondingly, 13.9% of the children in "single parent" families, as compared to only 8.8% of the children in divorced families and only 5.9% of the children in separated families, lived with their fathers. United States Bureau of the Census, 1 U.S. Census of the

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that all mothers of illegitimate children always have close ties with their children, yet that none of the fathers of illegitimate children ever have close ties with their children; (6) that all men who are prospective adoptive parents of orphaned children always have close ties with those children, yet that none of the fathers of illegitimate children ever have close ties with their children.[17]

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Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary-Sec. 2 Table 206 (1973). See appellants' main brief p. 27-28, n. 21 for citation to and full explanation of the definition of "single parent" and "own children."

[17]The 1970 census figures demonstrate that 14.3% of families headed by a "single parent" with "own children" under 18 were headed by fathers and correspondingly that 13.9% of children under eighteen living with "single parent" lived with their single fathers. U.S. Bureau of the Census, 1 U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary-Sec. 2, Table 206 (1973). These figures would undoubtedly be even higher were it not for laws such as the one challenged in this case which have effectively prevented fathers and their illegitimate children from living together. Thus until 1972, when *Stanley v. Illinois*, 405 U.S. 645, was decided, states were allowed to deprive an unwed father of the custody of his illegitimate child even if he were not proven to be an unfit parent. Moreover, the figure does not fully reflect all those fathers who live with their illegitimate children. For example, the census category upon which the figure is based would not include those fathers who lived with the mothers of their children as well as with their children, and those fathers who lived with their parents as well as with their children. See, for example, a study which reported that 33% of illegitimate fathers lived with the child and mother sometime after the child's birth. Sauber, "The Role of the Unmarried Father", 4 *Welfare in Review* 15, 16 (Nov. 1966). Further, as other studies have shown, even fathers not living with their illegitimate children demonstrate genuine interest in and concern for them and assume the sociological functions of fatherhood, including the provision of financial and emotional support. See Appellants' main brief, pp. 27-28.

In its brief, the Government effectively concedes the utter irrationality of the stepparent provision (INA §101(b)(1)(B) and (2) (8 U.S.C. §1101(b)(1)(B) and (2)). See Appellees' brief, p. 38 n. 28. Under this provision, if the unwed father of an illegitimate child marries someone other than the mother, his wife is his illegitimate child's "parent," and if his wife has an illegitimate child by some other man, her husband is her child's "parent." Yet the unwed natural father is totally precluded by operation of the statute from qualifying as the "parent" of his own child. The Government essentially contends that the irrationality is cured by a narrowing construction adopted by the defendants which requires proof in the stepparent case of the existence of actual family unity. It is simply and patently not a sufficient answer to the irrationality of the statutory classification that the administrative agency, in implementing the statute, has interpreted a provision of it so as to dilute its facial irrationality. Moreover, if the overbreadth of the stepparent category can be so readily and conveniently cured by the flexibility of administrative rules and procedure, any similar overbreadth that might exist in allowing United States citizen unwed fathers to qualify their alien illegitimate children for the statutory right in question can be dealt with in identical fashion by the administrative agency. See Appellant's main brief, pp. 42-48.

Even if there were some empirical support, which the Government has not mustered, for the gender and legitimacy based generalizations concerning the family relationship between unwed fathers and their illegitimate children, there could still be no constitutional justification for these extreme statutory classifications, since they deny citizen unwed fathers and their alien illegitimate children even an opportunity to establish an

eligibility for a statutory right which is merely presumed for other parents and children.[18] Thus, in *Frontiero v. Richardson* 411 U.S. 677 (1973), this Court held unconstitutional the statutory discrimination against a married woman who was seeking additional salary and fringe benefits that would have automatically gone to a married man, despite the observation that husbands in our society are generally "bread winners" and wives are "dependents," and despite the fact that under the statute the woman afforded the procedural opportunity to prove her husband's dependence on her. In *Weinberger v. Wiesenfeld*, 402 U.S. 636 (1975), this Court, while observing that "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support," held that it was nonetheless unconstitutional to provide Social Security benefits to widows but not widowers with children in their care. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held that even if it could be assumed that most unmarried fathers are unsuitable and neglectful parents, this would nonetheless not justify the presumption that fathers but not mothers of illegitimate children are always unfit parents.

Plainly inapposite here are *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Mathews v. Lucas*, ___U.S.___, 49 L.Ed.2d 651 (1976). The Government cannot succeed in its efforts to equate the gross unconscious stereotype

[18] Further, any such empirical support for the contention that the parents covered by the statute are more likely than unwed fathers to have close ties to their children would not sustain the validity of this statutory classification, because under the statute eligibility for the statutory right is not necessarily conditioned upon establishment of close family ties in every case. *Cf. Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 fn. (concurring opinion).

which underlies the classifications challenged here with the clearly articulated substantive policy determination which provided the foundation for the statute upheld in *Salfi*. In *Salfi*, the majority emphatically stressed the importance to the result in that case of the actually expressed and strongly held Congressional purpose to avoid the recognized abuse of sham marriages by enacting the nine-month-duration-of-relationship requirement of the Social Security Act which was found to be rational.[19] Further, in enacting the statute sustained in *Salfi*, Congress legislated by means of a broad prophylactic rule which was applied evenhandedly to all categories of claimants, without picking and choosing among affected persons according to their sex or illegitimacy. It is this invidious element of dual sex and illegitimacy discrimination which additionally distinguishes this case from *Salfi*. Indeed, had *Salfi* involved the imposition by Congress of the nine-month-duration-of-relationship requirement on surviving spouses of one sex and not the other, on the basis of sexual stereotyping, the result would surely have been different. *Contrast Weinberger v. Wiesenfeld, supra.*

Mathews v. Lucas, ___U.S.___, 49 L.Ed. 2d 651 (1976), differs fundamentally from this case. There, the

[19] As appellants have shown, Congress indicated no concern with spurious claims or administrative convenience in enacting the challenged provisions. Appellants' main brief, p. 40. It is noteworthy that at Congressional hearings recently held to consider a bill that would have equalized the situations of citizen unwed fathers and other citizen parents (see appellees' brief, p. 46 n. 34), the members of the subcommittee clearly expressed their view that the potential for fraudulent claims is not a concern of Congress and should be addressed by the agencies and personnel who administer the statute. Hearings on H.R. 10993 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 2nd Sess. (July 28, 1976).

majority emphasized that the challenged statute discriminated against a certain group of illegitimate children only to the extent of imposing on them a burden of proof of which others were relieved. This Court made it clear that this factor crucially distinguished the *Lucas* statue from that which was invalidated in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), which flatly and conclusively denied to a sub-class of illegitimate children *any* opportunity to establish eligibility for federal benefits. The provisions challenged in this case, unlike the ones sustained in *Lucas* and like the ones invalidated in *Jimenez* and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), absolutely forclose United States citizen unwed fathers from *any* opportunity to establish their family relationship with their alien illegitimate children, while automatically presuming the existence of the family relationship between other parents and children. Additionally, this Court in *Lucas* distinguished *Frontiero v. Richardson*, 411 U.S. 677 (1973), a case also involving a statute which merely imposed a heavier burden of proof on the affected class, by observing that the discrimination in *Frontiero*, like that at issue here, was "gender based" and rested upon an "overbroad assumption."

Finally, the Government argues that this Court should not invalidate the challenged statutory classifications because of the allegedly disruptive administrative implications of such a result. Appellee's brief, p. 45. However, as appellants showed in their main brief, pp. 40-48, any administrative inconvenience attendant upon the claims made by citizen fathers of alien illegitimate children is no different from that involved in the determination of the claims of parents who come within the statutory definition. The determination of paternity would be exactly the same for the father of

an illegitimate child as for the unwed father of a child who happens to be legitimate because she/he was born in a place where all children are legitimate, or for the father of an illegitimate child whose wife is considered his child's parent. In a letter submitted to a Congressional subcommittee and lodged by the Government with the Clerk of this Court (see Appellees' brief, p. 40 n. 29), the defendant Administrator of the Bureau of Security and Consular Affairs, testifying on behalf of the Department of State, concedes that consuls have already developed and routinely apply standard methods for the determination of paternity of an illegitimate child. More fundamentally, in every case of a claimed parent-child relationship, the burden rests on the claimed citizen parent to establish to the satisfaction of consular and immigration officers, by whatever evidence they require, that in fact she or he is the parent of the child. See Appellants' main brief pp. 42-44.

It is difficult to comprehend what would motivate a United States citizen to fraudulently claim the fatherhood of an illegitimate child who was not in fact his own. In order to sustain his claim of parenthood, the United States citizen must gather evidence and subject himself to the scrutiny of immigration officials on two separate occasions. He must make a trip to another country and subject himself to the scrutiny of a United States consul. If he perpetrates any fraud he is subject to serious criminal penalties. He must reveal his assets and agree to be financially responsible for a child. See Appellants' main brief pp. 42-44. And his only reward is the companionship of and responsibility for a child,

which, if not his own, he would be presumptively have no interest in.[20]

In summary, appellants contend that this Court can not and should not constitutionally tolerate such extreme discrimination against United States citizens as is embodied in the challenged statutory provisions, discrimination which bears no rational relationship to the actual Congressional purpose, discrimination on the bases of gender and illegitimacy which has a devastating effect upon the constitutionally fundamental interests of citizens, and discrimination which not only rests upon, but reinforces and perpetuates, outmoded and grossly overbroad stereotypes concerning the family relationship between unwed fathers and their illegitimate children.

[20] The Government also contends that "havoc" would result from invalidation of this statute because of the assertedly "pyramiding" effect of allowing unwed fathers to bring their illegitimate children into this country. This *ad hominem* argument plainly lacks substance. Any illegitimate child of a citizen father who entered the United States would have to wait until she/he became a citizen and then further wait until he reached 21 years of age before he could, if he so desired, petition for the entry of his mother. INA §201(b) (8 U.S.C. §1151(b)). He would have to have a close enough relationship with his mother for him to be willing to undergo the rigorous screening and investigative procedures, and then would be required to sign an affidavit of support on her behalf. If the mother did obtain entry into the United States, she would then have to wait another five years before being eligible to become a citizen and only upon obtaining citizenship could she then apply for immediate relative status on behalf of any other child she might have. INA §316 (a) (8 U.S.C. §1427). Further, it is disingenuous for the Government, in defense of these statutory provisions, to raise the spectre of the alleged "pyramiding" effect of increasing the class of "parents" and "children" by judicial decision, when the legislative history discloses no similar Congressional concern about the same "pyramiding" effect of its own amendments to the definition of "parent" and "child."

CONCLUSION

For the reasons stated above and in their main brief, plaintiffs-appellants respectfully request that this Court reverse and vacate the judgment of the District Court, find that the challenged provisions are constitutionally invalid, in violation of the First, Fifth, and Ninth Amendments, and remand this case to the District Court with directions that it (1) issue a permanent injunction against the operation, execution and enforcement of the challenged statutory provisions, (2) determine plaintiffs' motion for class action certification, and (3) order the defendants to afford the plaintiffs the opportunity to establish their claimed family relationships and to grant them whatever immigration status they would have had but for the unconstitutional application of the challenged provisions.

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Respectfully submitted,

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